(13)

No. 95-1268-CSY Title: Maryland, Petitioner
v.
Jerry Lee Wilson

Docketed: February 9, 1996 Court: Court of Special Appeals of Maryland

Entry	Date	Proceedings and Orders
	Feb 9 1996	Petition for writ of certiorari filed. (Response due May 20, 1996)
	Mar 11 1996	Brief amici curiae of Ohio, et al. filed.
	Mar 20 1996	DISTRIBUTED. April 12, 1996
	Apr 1 1996	Response requested. (Due May 2, 1996)
	Apr 16 1996	Order extending time to file response to petition until May 20, 1996.
	May 20 1996	Brief of respondent Jerry Lee Wilson in opposition filed.
	May 20 1996	Motion of respondent for leave to proceed in forma pauperis without an affidavit of indigency executed by the respondent filed.
	May 29 1996	REDISTRIBUTED. June 14, 1996
	Jun 17 1996	Motion of respondent for leave to proceed in forma pauperis without an affidavit of indigency executed by the respondent GRANTED.
	Jun 17 1996	Petition GRANTED. SET FOR ARGUMENT December 11, 1996. **********
	Jul 17 1996	Motion of respondent for appointment of counsel filed.
	Jul 24 1996	DISTRIBUTED. September 30, 1996 (Page 59)
	Jul 26 1996	Brief amici curiae of Americans for Effective Law Enforcement, Inc., et al. filed.
	Aug 1 1996	Joint appendix filed.
	Aug 1 1996	Brief of petitioner Maryland filed.
	Aug 1 1996	Brief amicus curiae of United States filed.
	Aug 1 1996	Brief amicus curiae of National Association of Police Organizations, Inc. filed.
	Aug 1 1996	Brief amici curiae of Ohio, et al. filed.
	Aug 1 1996	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Aug 15 1996	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Aug 15 1996	Record filed.
	Aug 19 1996	Record filed.
	Sep 3 1996	Order extending time to file brief of respondent on the merits until September 9, 1996.
	Sep 10 1996	Brief of respondent Jerry Lee Wilson filed.
	Sep 20 1996	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Oct 7 1996	Motion for appointment of counsel GRANTED and it is ordered that Byron L. Warnken, Esquire, of Baltimore, Maryland, is appointed to serve as counsel for the respondent in this case.
	Oct 10 1996	Reply brief of petitioner Maryland filed.

APP

No. 95-1268-CSY

Entry	Date	Proceedings and Orders
	Nov 6 1996	CIRCULATED.
	Dec 11 1996	ARGUED.

Supreme Court, U.S.
FILED

951268 FEB 9 - 1996

OFFICE OF THE CLERK

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF MARYLAND,
Petitioner,

v.

JERRY LEE WILSON,
Respondent.

On Petition For Writ of Certiorari
To The Court of Special Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a police officer makes a lawful traffic stop, does the officer's automatic right to order the driver to exit the vehicle pursuant to *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), extend to passengers in the stopped vehicle?

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties below.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No.

STATE OF MARYLAND,
Petitioner,

v.

JERRY LEE WILSON,
Respondent.

On Petition For Writ of Certiorari
To The Court of Special Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Special Appeals of Maryland in this case.

OPINIONS BELOW

The reported opinion of the Court of Special Appeals of Maryland, *State v. Wilson*, 106 Md. App. 24, 664 A.2d 1 (1995), affirming the granting of respondent's motion to suppress, is reproduced in Appendix A. (App. 1a-32a). A

prior unreported order affirming the judgment below is reproduced in Appendix D. (App. 38a).

The unreported opinion and order of the Circuit Court for Baltimore County granting Wilson's motion to suppress is reproduced in Appendix B. (App. 33a-36a).

The order of the Court of Appeals of Maryland denying the State's petition for a writ of certiorari, *State v. Wilson*, 340 Md. 502, 667 A.2d 342 (1995), is reproduced in Appendix C. (App. 37a).

STATEMENT OF JURISDICTION

The order of the Court of Appeals of Maryland denying the State's petition for a writ of certiorari was filed on November 22, 1995. This petition is filed within ninety days of that order, as required by Rule 13 of the Rules of the Supreme Court. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

At approximately 7:30 p.m. on June 8, 1994, Maryland State Police Trooper David Hughes observed a white 1994

Nissan Maxima driving in the left lane of Interstate 95 in Baltimore County at what appeared to be a high rate of speed. (App. 2a). Hughes pulled out onto the road and drove directly behind the vehicle, "pacing" it for one mile and determining its speed to be 64 miles per hour in a 55 miles-per-hour zone. (*Id.*). Trooper Hughes noticed that there was no license tag on the front or back of the car, except that on the back there "was a paper tag kind of hanging half off, half on that said Enterprise Rent-A-Car." (*Id.*). The officer activated his lights and siren, but the driver of the vehicle continued to drive for approximately one-and-one-half miles before finally stopping. (*Id.*).

During the pursuit, Officer Hughes observed three people in the car, two in the front and one in the back. (*Id.*). Hughes saw constant movement by the front and rear seat passengers. In particular, the passengers turned and looked at the police officer several times and continuously ducked below the seat level and then reappeared. (*Id.*). Once the vehicle stopped, Hughes continued to see a lot of movement in the car, which made him hesitant to approach it.

Trooper Hughes got out of his vehicle and saw that the driver of the Nissan had already exited the car. (App. 2a-3a). The trooper directed the driver, Mr. McNichol, to step back toward him, and Hughes met the driver in between their vehicles. (App. 3a). Hughes advised McNichol that he had been stopped for speeding and asked to see his license and registration card. (*Id.*). McNichol produced a valid Connecticut driver's license and told the officer that he was on his way from Connecticut to South Carolina. (*Id.*). When McNichol indicated that the rental papers were in the car, Hughes instructed him to retrieve them. (*Id.*).

Throughout this encounter, Officer Hughes noticed that McNichol was unusually nervous. (App. 3a). He was trembling and was answering every question with another question. (*Id.*). Hughes also observed that the front seat passenger, respondent Jerry Lee Wilson, was sweating and extremely nervous. (*Id.*). The officer then asked Wilson to exit the vehicle and step back toward Hughes. (*Id.*). After initially refusing to comply with the officer's request, Wilson opened the door to the car and took one step out, whereupon crack cocaine dropped to the ground. (*Id.*). At that time, Trooper Hughes arrested Wilson. (*Id.*).

Wilson was indicted on charges of possession of cocaine with intent to distribute and related offenses. (App. 1a). At a suppression hearing held on November 23, 1994, the single issue before the court was whether the officer had violated Wilson's Fourth Amendment right to be free from unreasonable seizures when he ordered Wilson to step out of the vehicle. (App. 3a-4a). Wilson argued that the cocaine should be suppressed because Trooper Hughes was not justified in requiring him to get out of the vehicle. The prosecutor argued that the officer had the authority pursuant to *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), to order Wilson out of the car and, alternatively, that the officer had reasonable articulable suspicion to do so. (App. 34a-35a).[1]

Trooper Hughes was the sole witness at the suppression hearing. (App. 2a). In addition to establishing the facts set forth above, Trooper Hughes testified as follows when asked why he had directed Wilson to exit the Nissan:

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[1] The State of Maryland is presently pressing only the first justification for the officer's order to exit the vehicle; thus, the alternative rationale for the order is not before this Court.

> Well, due to the movement in the vehicle I thought possibly there could be a handgun in the vehicle. I had concern for my safety. At that time when Mr. McNichol went back to the car, I asked Mr. Wilson to step out, that is my whole purpose of not approaching the vehicle, by myself, with three occupants in the vehicle, I wanted each one out at a time to speak to each individual, for my safety.

(App. 3a).

On January 10, 1995, the court granted Wilson's motion to suppress, ruling that *Pennsylvania v. Mimms* did not authorize a police officer making a traffic stop to order all passengers out of the car. (App. 34a-35a).[2] The State appealed this ruling to the Court of Special Appeals of Maryland. (App. 1a-2a). Speaking through Judge Charles E. Moylan, Jr., Maryland's intermediate appellate court framed the issue this way:

> The issue before us is very narrow. When a police officer makes a routine traffic stop, does his automatic right to order the driver to exit the vehicle, a procedure deemed to be constitutionally reasonable by *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), also extend to passengers in the stopped vehicle?

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[2] The court further ruled that the officer could not have had reasonable suspicion to believe persons in the vehicle were armed and dangerous because Hughes allowed the driver to return to the car to obtain the rental documents. (App. 35a). As stated above, this ruling is not being challenged here. *See* note 1, *supra*.

(App. 2a).

After discussing *Mimms* and pointing out that it did not deal with the right of officers to order passengers—as opposed to the driver—out of vehicles, (App. 7a-10a), the court carefully examined this Court's decisions that might be read as extending the *Mimms* principle to passengers, namely *Rakas v. Illinois*, 439 U.S. 128 (1978), and *Michigan v. Long*, 463 U.S. 1032 (1983), (App. 10a-14a). The Court of Special Appeals of Maryland concluded that any references in those cases to *Mimms* were merely in passing and that any statement regarding the authority to order passengers from a vehicle was mere *dicta*, and mistaken at that. (*Id.*).

The court next examined the logic of *Mimms* to determine whether the rule governing drivers should apply to passengers. (App. 16a-21a). Although acknowledging it to be "a close question," the court held that the *Mimms* rule should not be extended to passengers. (App. 21a). The court reasoned that the passenger stood in a different position than the driver, who already was the subject of a lawful detention:

> Under the circumstances, a police intrusion on the Fourth Amendment interest of the passenger is not so minimal or merely incremental as to be of no more than slight significance in the weighing operation. To order a passenger to stay in the car or to get out of the car is the imposition of detention *per se*, and not a mere shift of the location of already established detention.

(App. 20a-21a). After noting the split of authority around the country, (App. 21a-25a), the court suggested that although passengers could not automatically be ordered from a stopped car, the justification for such an order

might be less than, and different from, the articulable suspicion necessary for a *Terry*[3] stop. (App. 26a-27a). In *dicta*, the court opined that perhaps a passenger could be ordered from a stopped vehicle based upon an officer's "reasonable justification for a sense of heightened caution or apprehension." (App. 32a).

REASONS FOR GRANTING THE WRIT

By requiring even a low level of justification to order passengers from a stopped vehicle, the court below and other courts adhering to this view endanger the hundreds, if not thousands, of police officers who stop vehicles each day for traffic violations.[4] Recognizing the danger inherent in these "routine" stops, this Court, almost two decades ago in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), fashioned a rule permitting police in the course of a lawful traffic stop to order the driver out of the vehicle without any particularized suspicion that the driver posed a threat to the officer's safety. This Court has yet to rule directly that police have the same authority, for the same reasons, to order passengers out of vehicles;

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[3] *Terry v. Ohio*, 392 U.S. 1 (1968).

[4] More than twenty years ago, this Court cited a study showing "that approximately 30% of shootings of police officers occur when an officer stops a person in an automobile." *United States v. Robinson*, 414 U.S. 218, 234 n.5 (1973). The same study was also cited in *Adams v. Williams*, 407 U.S. 143, 148 n.3 (1972), and in *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (per curiam). Given the present-day proliferation of handguns and other firearms, the percentage of such shootings may well be much higher today.

however, the issue has arisen in numerous lower court decisions. Notwithstanding strong suggestions from this Court that the rule of *Mimms* applies to drivers and passengers alike, the courts are divided on the issue. With this case, the Court can explicitly state the rule that has been suggested by its earlier decisions, resolve the existing conflict among the lower courts, and provide a single bright-line standard to guide law enforcement officials who frequently confront this Fourth Amendment issue.

I.

THE LOWER COURT'S OPINION IS CONTRARY TO PRECEDENT OF THIS COURT.

The question whether a police officer, as a matter of routine practice and in the interest of officer safety, may order passengers to exit a lawfully stopped vehicle has not been squarely addressed by this Court. The Court has given strong indications, however, that the rule announced in *Mimms* for drivers does extend to passengers. The first, and perhaps strongest, indication of this is found in *Mimms* itself. In that case, this Court held that a police officer's order to a driver to step out of his car during a lawful traffic stop conformed to the dictates of the Fourth Amendment. 434 U.S. at 111. The Court balanced the *de minimis* intrusion into the driver's privacy and liberty interests against the State's "legitimate and weighty" interest in protecting officer safety. *Id.* at 110-11. The Court concluded that, on balance, an officer's ordering the driver to alight is *per se* reasonable without requiring the officer to show particularized justification for the order.

Id. at 111.

The Court's holding and the rationale for it prompted Justice Stevens to comment in his dissenting opinion: "Because the balance of convenience and danger is no different for passengers in stopped cars, the Court's logic necessarily encompasses the passenger." *Id.* at 122 (Stevens, J., joined by Brennan & Marshall, JJ., dissenting). Justice Stevens noted that the justification for the *Mimms* rule is grounded on "an assumption about the danger associated with every stop—no matter how trivial the offense" and that, accordingly, "the new rule must apply to the passenger as well as to the driver." *Id.* at 122-23. Notably, although the Court refuted a different remark in Justice Stevens's dissent, *id.* at 111 n.6, the Court did not dispute Justice Stevens's assessment that the *Mimms* rule applies to drivers and passengers alike.

Justice Powell, too, has read *Mimms* as applicable to passengers: "Last Term, this Court determined in *Pennsylvania v. Mimms* that passengers in automobiles have no Fourth Amendment right not to be ordered from their vehicle, once a proper stop is made." *Rakas v. Illinois*, 439 U.S. 128, 155 n.4 (1978) (citation omitted) (Powell, J., joined by Rehnquist, C.J., concurring). Five years later, the Court noted in *Michigan v. Long*, 463 U.S. 1032, 1047-48 (1983), "that investigative detentions involving suspects in vehicles are especially fraught with danger to police officers," and declared: "In *Pennsylvania v. Mimms* we held that police may order *persons* out of an automobile during a stop for a traffic violation, and may frisk those persons for weapons if there is a reasonable belief that they are armed and dangerous." (Citation omitted and emphasis added). Given these pronouncements in *Mimms*, *Rakas*, and *Long*, there is little

doubt that the Court itself views the *per se* rule of *Mimms* as covering both drivers and passengers of lawfully stopped vehicles.

II.

THE FEDERAL AND STATE COURTS THAT HAVE CONSIDERED THE ISSUE ARE IN CONFLICT.

Notwithstanding this Court's repeated suggestions that the *Mimms* rule applies to passengers, the lower federal and state courts that have addressed the question are sharply divided on its proper resolution. Most courts allow police as a matter of routine to order passengers out of a lawfully stopped vehicle. Far fewer courts require, as did the lower court in this case, that the officer harbor some level of particularized suspicion that a passenger poses a danger before the officer is permitted to act.

The Court of Appeals for the Ninth Circuit typifies the many courts that recognize the automatic right of police to order passengers out of lawfully stopped vehicles. In its recent decision in *Ruvalcaba v. City of Los Angeles*, 64 F.3d 1323 (9th Cir. 1995), the court analyzed the issue by commenting preliminarily that, given *Mimms*, it was "not writ[ing] on a blank slate." *Id.* at 1326. The court reasoned that the weighty governmental interest in protecting police from the danger inherent in confronting a driver is "equally grave when a police officer confronts passengers; indeed, it may be more dangerous to have the driver outside the vehicle while one or more passengers are left inside." *Id.* at 1327. In this regard, the court pointed out that the governmental interest in officer safety

does not flow from the driver as a result of being stopped for a traffic violation, but from the danger inherent in approaching seated people in a vehicle, whether driver or passengers. *Id.* at 1327-28. Given all of this, the court concluded that the *Mimms* rule "is equally applicable to passengers in a vehicle as it is to drivers." *Id.* at 1327.

Like the Ninth Circuit, other courts are of the view that the *Mimms* rule applies with equal, or even greater, force to passengers because the potential danger to the officer increases when passengers are present during a traffic stop. *See State v. Landry*, 588 So. 2d 345, 347 (La. 1991) (likelihood of danger to police may be greater when there are a number of occupants); *People v. Martinez*, 187 Mich. App. 160, 167 n.5, 466 N.W.2d 380, 384 n.5 (1991) ("[O]ne could even advance the argument that the passenger presents a greater threat to the officer than does the driver, since the officer's attention in the traffic stop is going to be focused on the driver, and he may not be immediately aware of the activities of the passenger, including the possibility that the passenger may retrieve a gun and assault the officer."), *vacated on other grounds*, 439 Mich. 986, 483 N.W.2d 868 (1992); *Commonwealth v. Brown*, 439 Pa. Super. 516, 528, 654 A.2d 1096, 1102 (due to nature of potential danger, officer's concerns increase with the number of occupants in a car), *appeal denied*, 664 A.2d 972 (Pa. 1995). *See also United States v. McCoy*, 824 F. Supp. 467, 474 (D. Del. 1993) (upholding officer's command that occupants exit vehicle and commenting that "it would be incongruous to permit an officer to order the driver out of his vehicle pursuant to a lawful stop in order to diminish the likelihood that the officer will be attacked with a concealed weapon, but not to permit the officer to order the passengers out of a

lawfully stopped vehicle, when those passengers present the same risk of attack and have the same access to concealed weapons").

Other courts as well have extended *Mimms* to apply to passengers in vehicles that are the subject of lawful traffic stops. *E.g.*, *Doctor v. State*, 573 So. 2d 157, 159 (Fla. App. 1991), *rev'd in part on other grounds*, 596 So. 2d 442 (Fla. 1992); *Warr v. State*, 580 N.E.2d 265, 267 (Ind. App. 1991); *Commonwealth v. Pappalardo*, 10 Mass. App. 897, 409 N.E.2d 815, 816 (1980); *State v. Reynolds*, 753 S.W.2d 1, 2 (Mo. App. 1988); *People v. Robinson*, 74 N.Y. 2d 773, 775, 545 N.Y.S.2d 90, 91, 543 N.E.2d 733, 733-34, *cert. denied*, 493 U.S. 966 (1989); *State v. Gilberts*, 497 N.W.2d 93, 96 (N.D. 1993); *State v. Soares*, 648 A.2d 804, 806 (R.I. 1994); *Bethea v. Commonwealth*, 14 Va. App. 474, 476-78, 419 S.E.2d 249, 250-52 (1992) (*en banc*), *aff'd on other grounds*, 245 Va. 416, 429 S.E.2d 211 (1993). *See also State v. Webster*, 170 Ariz. 372, 374, 824 P.2d 768, 770 (1991) (holding that *Mimms* authorizes police to order passengers out of a vehicle and, by like reasoning, authorizes police to order passengers back into lawfully stopped vehicles).[5]

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[5] Still other courts—federal and state alike—have not hesitated to comment that *Mimms* is applicable to all occupants of lawfully stopped vehicles, even though the issue was not directly before the court for decision. *E.g.*, *United States v. Powell*, 929 F.2d 1190, 1195 (7th Cir.), *cert. denied*, 502 U.S. 891 (1991); *United States v. Sanders*, 631 F.2d 1309, 1312 n.2 (8th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981); *People v. Melgosa*, 753 P.2d 221, 225 (Colo. 1988); *State v. Dukes*, 209 Conn. 98, 122, 547 A.2d 10, 22 (1988); *Thomas v. United States*, 553 A.2d 1206, 1207 n.7 (D.C. 1989); *People v. Salvator*, 236 Ill. App. 3d 824, 840, 602 N.E.2d 953, 963

A minority of courts rejects the notion that the *Mimms* analysis justifies automatically ordering passengers out of a stopped vehicle, and requires instead that the stopping officer articulate some specific justification for having passengers alight. The present case is perhaps the paradigm of this view. Authored by Judge Charles E. Moylan, Jr., a noted Fourth Amendment authority, this case holds that passengers do not stand in the same position as drivers, because the passenger has broken no law; plays no role in the exchange between the officer and driver; has a higher expectation of privacy; and should be able to walk away from the scene unless the officer has a legitimate reason to detain him. (App. 20a).

Professor LaFave shares this view and suggests that in a routine traffic stop, as opposed to a stop of a car based on suspicion of more serious criminal activity involving use of the vehicle, police should not be given "the discretion to order the passenger from the automobile without requiring any explanation of the officer's actions (other than a blanket concern for personal safety in all situations)." 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.5(a) at 268 (3d ed. 1996) (*quoting State v. Williams*,

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(1992), *appeal denied*, 148 Ill. 2d 651, 610 N.E.2d 1273 (1993); *State v. Ferrise*, 269 N.W.2d 888, 890-91 (Minn. 1978); *State v. Williams*, 94 Ohio App. 3d 538, 544, 641 N.E.2d 239, 243, *dismissed*, 70 Ohio St. 3d 1446, 639 N.E.2d 114 (1994); *State v. Richardson*, 156 Wis. 2d 128, 143, 456 N.W.2d 830, 836 (1990). *See also United States v. Hill*, 60 F.3d 672, 682 (10th Cir.) (holding that *Mimms* applies to passenger where passenger is a suspect, but also pointing out that, in *Long*, this Court indicated that *Mimms* permits police to order *persons* out of an automobile during a traffic stop), *cert. denied*, 116 S. Ct. 432 (1995).

366 So. 2d 1369, 1374 (La. 1978)). To conclude otherwise, LaFave suggests, "is to abandon the requirement of individualized inquiry into the reasons for an intrusion of the right to privacy." *Id.* (quoting *State v. Williams*, 366 So. 2d at 1374).[6]

The approach requiring some level of particularized justification before an officer may order a passenger out of a car in a routine traffic stop has been adopted by a small number of courts. *E.g., People v. Maxwell*, 206 Cal. App. 3d 1004, 1008-09, 254 Cal. Rptr. 124, 126-27 (1988); *State v. Becker*, 458 N.W.2d 604, 607 (Iowa 1990); *State v. Smith*, 134 N.J. 599, 616-17, 637 A.2d 158, 166 (1994); *Johnson v. State*, 601 S.W.2d 326, 328-29 (Tenn. Crim. App. 1980). *See also State v. Schlosser*, 774 P.2d 1132, 1135 n.3 (Utah 1989) (noting that this Court expressly limited its *Mimms* holding to the driver of a vehicle lawfully stopped pursuant to a traffic violation). But even these courts do not agree on the quantum of suspicion necessary to order passengers out of cars. *Compare People v. Maxwell*, 206 Cal. App. at 1008, 254 Cal. Rptr. at 127 ("Even an inchoate and unparticularized suspicion that it would be better for the officer's safety for the passenger to alight is sufficient to justify such a request, because merely stepping out of the vehicle is a minimal intrusion upon privacy. . . .") (*quoting People v. Beal*, 44 Cal. App. 3d 216, 221, 118 Cal. Rptr. 272 (1974)) *and State v. Smith*, 134 N.J. at 618, 637 A.2d at 167 (requiring only that officer point to specific and articulable facts that would warrant "heightened awareness of danger"

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[6] *State v. Williams* has since been overruled by the Supreme Court of Louisiana in *State v. Landry*, 588 So. 2d 345, 347 (La. 1991), cited at page 11, *supra*.

justifying order that occupants alight) *with State v. Becker*, 458 N.W.2d at 607 (police officer needs articulable suspicion that passenger violated the law before ordering passenger out of car).

In short, the courts are in conflict not only on the question whether any level of case-specific justification is required before an officer may order a passenger out of a car during a routine traffic stop, but on the question of what quantum of suspicion, if any, is necessary. Given the importance and frequency of occurrence of the issue, the existing conflict warrants this Court's resolution.

III.

THIS COURT SHOULD ADOPT A BRIGHT-LINE RULE IN RESOLVING THE ISSUE.

In resolving the issue before it, this Court should reject the minority approach adopted by the court below. Instead, to assure officer safety and ease of application, the Court should extend the *Mimms* bright-line rule to passengers. To do so would be consistent with the Court's earlier statement in an analogous context that "the protection of the Fourth and Fourteenth Amendments 'can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.'" *New York v. Belton*, 453 U.S. 454, 458 (1981) (*quoting* Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 S. CT. REV. 124, 142). Currently, there is no "single, familiar standard . . . to

guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Id.* (*quoting Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)). A bright-line rule is all the more necessary given that during traffic stops "the officer remains particularly vulnerable in part *because* a full custodial arrest has not been effected, and the officer must make a 'quick decision as to how to protect himself and others from possible danger. . . .'" *Michigan v. Long*, 463 U.S. at 1052 (*quoting Terry v. Ohio*, 392 U.S. 1, 28 (1968)). This case presents the Court with the ideal vehicle for adopting such a standard.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Special Appeals of Maryland.

Respectfully submitted,

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February 9, 1996

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APPENDIX A

Court of Special Appeals of Maryland.

No. 113, Sept. Term, 1995

STATE OF MARYLAND

v.

JERRY L. WILSON

August 30, 1995

Argued before WILNER, C.J., and MOYLAN, and HARRELL, JJ.

MOYLAN, Judge.

The appellee, Jerry Lee Wilson, was indicted by the Baltimore County Grand Jury for the possession of cocaine with intent to distribute and for related narcotics and conspiracy offenses. He filed a pretrial motion to suppress physical evidence on the ground that it had been obtained in violation of his Fourth Amendment right to be secure from unreasonable searches and seizures. On November 23, 1994, Judge Thomas J. Bollinger conducted a suppression hearing and reserved his decision on the motion. On January 10, 1995, Judge Bollinger granted the appellee's motion to suppress the evidence. Under the provisions of Md.Code (1995 Repl.Vol.), § 12-302(c)(3) of the Cts. & Jud. Proc. Article, the State has appealed that

suppression order.

The Issue

The single issue before us is very narrow. When a police officer makes a routine traffic stop, does his automatic right to order the driver to exit the vehicle, a procedure deemed to be constitutionally reasonable by *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), also extend to passengers in the stopped vehicle?

The Factual Background

The only witness to testify at the suppression hearing was Trooper David Hughes of the Maryland State Police. At approximately 7:30 P.M. on June 8, 1994, Trooper Hughes observed a white 1994 Nissan Maxima driving southbound on I-95 at what appeared to be a high rate of speed. The trooper pulled into the lane behind the Maxima and "paced" it for approximately one mile. It was going 64 miles per hour in a 55 miles-per-hour zone. He also observed that there was no regular license tag on the front or rear of the car, except that on the back there was "a paper tag kind of hanging half off, half on that said Enterprise Rent-A-Car." Officer Hughes activated his lights and siren, but the Maxima continued to drive, with Trooper Hughes behind it, for approximately one-and-one-half miles before finally stopping in Baltimore City.

Both during the pursuit and then in approaching the Maxima after it had stopped, Trooper Hughes observed that the car had three occupants. During the pursuit, the two passengers had turned and looked at him several times and had on several occasions ducked below the sight level and then reappeared.

As Trooper Hughes started to approach the Maxima on

foot, he saw that the driver had spontaneously exited the vehicle. The trooper directed the driver to step back toward him and the two met at a point between their respective vehicles. Trooper Hughes advised the driver, a Mr. McNichol, why he had been stopped and asked McNichol for his license and registration card. McNichol explained that he was coming from Connecticut and going toward South Carolina. He produced a valid Connecticut driver's license. McNichol further indicated that the rental papers for the car were in the vehicle. It was at that point that Trooper Hughes instructed McNichol to return to the vehicle to retrieve the rental documents. McNichol got in the vehicle and sat in the driver's seat.

Throughout the initial encounter, Trooper Hughes had observed that McNichol was extremely nervous. He appeared at times to be trembling and answered every question with a question. Trooper Hughes had also observed that the front seat passenger, the appellee Jerry Lee Wilson, was sweating and extremely nervous.

It was after McNichol had reentered the car that Trooper Hughes ordered Wilson out of it. As Wilson complied with the trooper's direction to walk back closer to the police vehicle, what appeared to be (and, indeed, turned out to be) crack cocaine fell to the ground. Trooper Hughes drew his weapon and placed Wilson under arrest. When Trooper Hughes was asked why he had directed Wilson to exit the vehicle, he replied:

> Well, due to the movement in the vehicle I thought possibly there could be a handgun in the vehicle. I had concern for my safety. At that time when Mr. McNichol went back to the car, I asked Mr. Wilson to step out, that is my whole purpose of not approaching the vehicle, by myself, with three occupants in the vehicle, I wanted each one out at a time to speak to each individual, for my safety.

The single issue before Judge Bollinger was whether

Trooper Hughes violated Wilson's Fourth Amendment right against having his person seized unreasonably when he ordered Wilson to step out of the vehicle.

A False Trail

Both at appellate argument and in appellate brief, the State urged, as an alternative rationale, that Trooper Hughes had articulable or particularized suspicion under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968), either to "stop" Wilson for questioning or to "frisk" Wilson for weapons. Under either set of circumstances, the minimal seizure of Wilson's person occasioned by ordering him from the car would have been reasonable. We reject the State's alternative rationale, however, for several reasons.

In the first place, the State never urged such a basis for the exit-order at the suppression hearing. Judge Bollinger was not called upon to rule whether there was articulable suspicion either for a *Terry* "stop" or for a *Terry* "frisk" and, indeed, he made no such rulings.

With respect to this alternative rationale, the State is even more bereft. Articulable suspicion, for either a stop or a frisk, requires not simply the external circumstances that would justify such particularized suspicion. It requires, in addition, that the officer purporting to act on the basis of such suspicion actually *articulate* such a purpose and such a basis for action. *Gibbs v. State*, 18 Md.App. 230, 239–42, 306 A.2d 587 (1973).

What must be *articulated* to justify a *Terry* "stop" is particularized suspicion that a crime has occurred, is then occurring, or is about to occur. A "stop," unlike a "frisk," is crime-related, not weapon-related. The societal purpose served by a *Terry* "stop" is the prevention or detection of crime. The justification for a "stop," therefore, must be

framed and phrased in terms of suspected crime. It is, moreover, the officer who must do the articulating, not the Attorney General by way of appellate afterthought. Trooper Hughes articulated nothing with respect to any crime that he suspected Wilson of being involved in. The absence of an articulated basis for a *Terry* "stop" is as absolute here as it was in *Gibbs v. State*:

> *Officer Stewart*, in the case at bar, *articulated absolutely nothing* as to what crime or type of crime he reasonably suspected the appellant of having engaged in, of then engaging in, or of being about to engage in. (Emphasis supplied.)

18 Md.App. at 241, 306 A.2d 587.

With respect to a possible justification for the exit-order based on the notion that Trooper Hughes was somehow undertaking a *Terry* "frisk," the overarching fact is that Trooper Hughes never remotely articulated having entertained any such purpose. He did, to be sure, express some fear that "possibly there could be a handgun in the vehicle." The ostensible purpose for ordering Wilson out of the car, however, was to take Wilson out of proximity to such a possible weapon rather than to frisk him for a weapon. Whatever Trooper Hughes was doing when he ordered Wilson out of the car, it was not in furtherance of any intent to conduct a frisk. In the absence of such a purpose, whether there might, in the abstract, have been a constitutional basis for a frisk is immaterial.

If these were not impediments enough, the State urges us to exercise our own independent constitutional appraisal on a *de novo* basis. Such appellate latitude is not available to us. Although we may exercise *de novo* review with respect to mixed questions of law and fact, we are enjoined to extend the more deferential "clearly erroneous" standard of review to the findings of the trial judge on purely factual questions. *Aiken v. State*, 101 Md.App. 557, 563, 647 A.2d 1229 (1994), *cert. denied*,

337 Md. 89, 651 A.2d 854 (1995); *State v. Jones*, 103 Md.App. 548, 606–11, 653 A.2d 1040 (1995). Judge Bollinger found as a first-level fact that Trooper Hughes possessed no fear that Wilson was armed. Judge Bollinger's conclusion was not that the external circumstances did not add up to articulable suspicion. That, indeed, would have been a finding on a mixed question of law and fact and would be subject to *de novo* review. Judge Bollinger's finding, by way of contrast, was that Trooper Hughes did not even possess such a suspicion. That is a finding of pure fact that can be overturned only if clearly erroneous.

In part because Trooper Hughes did not order all three individuals out of the Maxima initially, and in part because McNichol was freely permitted to reenter the vehicle, Judge Bollinger concluded that Trooper Hughes's action was not a preventative or preemptive measure intended to neutralize the risk of harm from offensive weapons. His conclusion was not that there was no basis for a reasonable suspicion that Wilson was armed and dangerous, but rather that Trooper Hughes entertained no such suspicion, reasonable or unreasonable:

> In this case the officer's experience is 13 months as a trooper and this Court finds that when the officer allowed the driver of the vehicle to return to the car to obtain the rental documents he could not have had a reasonable suspicion that the person was armed and dangerous; and therefore, any future intrusion into the right of the occupants of the car are violative of one's Fourth Amendment proscription of unreasonable searches and seizures.

As first-level fact finding, inevitably influenced by Judge Bollinger's observation of Trooper Hughes's demeanor and manner of testifying and by Judge Bollinger's assessment of Trooper Hughes's credibility, this is the type of thing that the trial judge is far more competent to weigh and to

decide than we would be on the basis of a cold record. This, we hold, is a finding that was not clearly erroneous.

It is as important, perhaps, to note what we do not hold as it is to note what we do. Had Judge Bollinger found that Trooper Hughes had reason to fear that Wilson might be in possession of a weapon and had ordered Wilson out of the vehicle in order to frisk him for a weapon, we are *not* holding that such a conclusion and such an action on the trooper's part would have been unreasonable. That, however, is not the decision before us for review. Judge Bollinger found, to the contrary, that the trooper had no such fear and we simply hold that Judge Bollinger was not clearly erroneous in so finding.

Pennsylvania v. Mimms

If the State's argument that it was reasonable for Trooper Hughes to order Wilson out of the car, therefore, is somehow to fly, it must lift off from the doctrinal launching pad of *Pennsylvania v. Mimms* and not from that of *Terry v. Ohio*.

It is treacherous to attempt to extract too much meaning from *Pennsylvania v. Mimms*. It is a six-page, unsigned opinion explaining a summary disposition reached without benefit of oral argument. One must be careful not to read more meaning into such an opinion than the authors ever intended to put there. The simple holding of *Pennsylvania v. Mimms* is that whenever a police officer stops a vehicle for a traffic violation, even of the most minor variety, it is reasonable for the officer to order the driver to alight from the vehicle before the officer proceeds to inspect the driver's license and registration card, to question the driver, to observe the driver with respect to sobriety, to issue a traffic citation, or to take other appropriate action.

In the *Mimms* case itself, two Philadelphia police officers had observed Harry Mimms driving an automobile

with an expired license plate. They stopped the car for the purpose of issuing a traffic citation. One of the officers approached the vehicle and asked Mimms to step out of the car and to produce his owner's card and operator's license. When Mimms did so, one of the officers noticed a large bulge under his sports jacket. Fearing that the bulge might be a weapon, the officer frisked Mimms and discovered in his waistband a .38 caliber revolver loaded with five rounds of ammunition. Mimms was arrested and convicted for carrying a concealed weapon and for carrying a firearm without a license.

In its opinion, the Supreme Court made it clear that its focus was very narrow. There was no question about the propriety of the initial stop of the vehicle. 434 U.S. at 109, 98 S.Ct. at 332. Nor was there any question about the propriety of the ultimate frisk of Mimms for weapons, because the observation of the bulge furnished articulable or particularized suspicion that a weapon might be present, to wit, an independent basis for that further intrusion. The only issue before the Supreme Court was the propriety of the intermediate act of ordering Mimms to step out of the vehicle after it had been stopped:

> [W]e need presently deal only with the narrow question of whether the order to get out of the car, issued after the driver was lawfully detained, was reasonable and thus permissible under the Fourth Amendment. This inquiry must therefore focus not on the intrusion resulting from the request to stop the vehicle or from the later "pat-down," but on the incremental intrusion resulting from the request to get out of the car once the vehicle was lawfully stopped.

434 U.S. at 109, 98 S.Ct. at 332.

After balancing the societal interest of protecting the officer from harm against the intrusion into the Fourth Amendment interests of the driver, the Court concluded that it is reasonable for an officer to order a driver to alight

from the vehicle whenever the vehicle is lawfully stopped for a traffic violation. The holding was very clear that that prerogative is automatic under such circumstances and that no individual or particularized suspicion that the driver might be armed is involved. The police practice under review in *Mimms* was always to order the driver to alight from the vehicle:

> The State freely concedes the officer had no reason to suspect foul play from the particular driver at the time of the stop, there having been nothing unusual or suspicious about his behavior. *It was apparently his practice to order all drivers out of their vehicles as a matter of course* whenever they had been stopped for a traffic violation. (Emphasis supplied.)

434 U.S. at 109–10, 98 S.Ct. at 332.

The police prerogative *vis-a-vis* a stopped driver is plenary and automatic. Once the lawfulness of the initial stop of the vehicle is established, nothing more need be shown on a case-by-case basis to justify the incremental intrusion of ordering the driver out of the vehicle. In the case now before us, Trooper Hughes had made a lawful stop of the Nissan Maxima on I–95. He was, thereby, automatically entitled to order the driver out of the car. It turned out, coincidentally, to be unnecessary because the driver had already alighted spontaneously.

The appellant Wilson, however, was not the driver but only one of the passengers. Did or did not the automatic police prerogative extend to him?

Mimms Did Not Deal With Passengers

The *Mimms* opinion was completely silent on the police prerogative, if any, *vis-a-vis* a passenger. There had coincidentally been a second occupant of Harry Mimms's vehicle who, it turned out, was carrying a .32 caliber revolver. Once that narrative fact was mentioned,

however, the armed passenger dropped totally from sight and the opinion does not further allude to him even obliquely. The Supreme Court, indeed, went out of its way to disclaim any consideration of the rights or vulnerabilities of passengers:

> The State does not, and need not, go so far as to suggest that an officer may frisk the occupants of any car stopped for a traffic violation. Rather, it only argues that it is permissible to order the driver out of the car.

434 U.S. at 110 n. 5, 98 S.Ct. at 332 n. 5.

The State argues, however, that the automatic police prerogative *vis-a-vis* a driver should be equally automatic *vis-a-vis* any other occupant of a stopped vehicle. The State actually makes two arguments in support of this proposition, one based on legal authority and the other based on the inherent logic of drawing the parallel.

A. The Argument Based on Legal Authority:

The State does not simply argue that the principle of *Pennsylvania v. Mimms* should be extended to passengers; it argues that the *Mimms* principle *already has* been extended to passengers. It cites as the extending authorities the Supreme Court opinions in *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) and *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), and our own opinion in *Derricott v. State*, 84 Md.App. 192, 578 A.2d 791 (1990), *rev'd on other grounds*, 327 Md. 582, 611 A.2d 592 (1992).

What significance, if any, has *Michigan v. Long*, *Rakas v. Illinois*, or our own *Derricott v. State* in resolving the issue now before us. If nothing else, they afford an occasion for serious philosophic reflection on the present state of *stare decisis*. In looking to the case law as a source of legal authority, there seems to be an almost

epidemic trend among lawyers generally–civil and criminal, on the prosecution side and the defense side of the trial table alike, and even among some judges–to forget the most elemental ABC's of first-semester, first-year Legal Method. Everything said by a judge or by a court is not of equal weight. Were the three cases that we are about to examine offering us three thoroughly considered holdings, their authority would stand on undeniable bedrock. Were they three well considered, well researched, and well analyzed instances of even deliberate and conscious *dicta*, they would still be standing on firm, persuasive ground. If, on further examination, however, they turn out to be no more than three careless, casual, and passing instances of the most *obiter* of *dicta*, they should represent no more to us than the glib blandishments of a snake oil salesman, no matter who wrote them.

In *Michigan v. Long*, the Supreme Court was not remotely dealing with a *Pennsylvania v. Mimms* situation. It was a case, rather, where there was undeniable articulable suspicion that an individual might be armed and dangerous. The only issue before the Court was whether a *Terry* "frisk" could extend geographically from the suspect himself into the passenger compartment of the automobile from which he had just alighted. *Pennsylvania v. Mimms* was cited only to illustrate that an automobile can be the source of a dangerous weapon. The reference to *Mimms* consisted of the following:

> In *Pennsylvania v. Mimms*, we held that police may order *persons* out of an automobile during a stop for a traffic violation, and may frisk those *persons* for weapons if there is a reasonable belief that they are armed and dangerous. Our decision rested in part on the "inordinate risk confronting an officer as he approaches a person seated in an automobile." (Citation omitted.) (Emphasis supplied.)

463 U.S. at 1047-48, 103 S.Ct. at 3480.

The *Mimms* principle itself was not being considered, let alone some more subtle ultra-*Mimms* distinction between driver and passenger. The only significance that could conceivably be derived from this quotation for present purposes is that twice the word "persons" appeared in the plural rather than in the singular. Clearly, there was involved no consideration of the police prerogative *vis-a-vis* a passenger as opposed to the prerogative *vis-a-vis* a driver, for in *Michigan v. Long* there was only one suspect involved–the driver himself. The casual use of the plural rather than the singular in this content does not in any way support the doctrinal weight the State seeks to place upon it. Every word that is uttered in a legal opinion is not legal authority.

The other two instances illustrate even more pointedly why the fundamental distinction between holdings and *dicta* should be rigorously maintained. In the Anglo-American common law tradition of judge-made law, it is, when we are meticulously precise about the matter, the *decision* of an appellate court that has, within the appropriate jurisdictional framework, binding precedential authority, and not necessarily the *opinion* announcing the decision. Generally speaking, however, when it comes to the actual holding of a case, the decision of a court and the opinion of the court announcing the decision are coterminous.

The precedential weight of a holding is predicated in large measure on its status as the *deliberate and considered judgment* of an entire collegiate court, including the opinion writer, on the issue before it that must be decided. Each member of an appellate court peers in with painstaking scrutiny not only on the decision itself but on the framing of the holding that announces the decision. The articulation of the holding passes through a stern editorial process that insists that every "i" be dotted, every "t" be crossed, every word be carefully chosen, and

every far-flung repercussion be sagely anticipated. A holding, therefore, has earned the authoritative weight we give it.

The holding, however, consists of no more than a few sentences or, at most, a few paragraphs, generally located near the end of what may be a twenty or thirty-page opinion. When it comes to the composition of the opinion leading up to the holding, the collegiate editorial reins are, although not totally relaxed, far looser. There is a wide stylistic range within which the opinion writer may freely express a particular legal philosophy; a special analytic approach to problem solving; possibly idiosyncractic reactions to certain arguments; or, above all, an individualistic writing personality. The active collegiate participation in the formulation of a holding retreats to gentle stylistic suggestion when it comes to the writer's modality of expression. It is not uncommon for a panel member to subscribe to an opinion, notwithstanding an occasional wince of pain or smile of indulgent tolerance along the way. The point is that everything said in an opinion–the *dicta*–is not entitled to the same weight as is the holding of the Court.

Well-considered *dicta*, of course, is sometimes very good and, therefore, of significant persuasive weight. That is a far cry, however, from giving persuasive weight to every hurried word that may appear in the course of an opinion. The opinion-writing process is frequently a high volume production line and it should be obvious that every syllable is not chiseled in marble. Inadvertent mistakes inevitably creep in. This is unremarkable, unless we seize upon the mistakes, extend them a precedential weight to which they are not entitled, and then follow them as false gods. The citations to *Rakas v. Illinois* and *Derricott v. State* at least flirt with just such precedential heresy.

The citation to *Rakas* is to a footnote in a concurring opinion. The issue for decision in *Rakas* had nothing to

do with the police prerogative to order a driver or a passenger to alight from an automobile. It dealt exclusively with the standing of a "mere passenger" to raise a Fourth Amendment challenge to the search of someone else's automobile. The footnote in the concurring opinion was responding to the dissent in the case and was making the point that an automobile generally, with no distinction even considered between driver and passenger, enjoys a lesser expectation of privacy than do other places, such as homes. *Pennsylvania v. Mimms* was used simply to illustrate that point:

> Last Term, this Court determined in *Pennsylvania v. Mimms* that passengers in automobiles have no Fourth Amendment right not to be ordered from their vehicle, once a proper stop is made. (Citation omitted.)

439 U.S. at 155 n. 4, 99 S.Ct. at 436 n. 4 (concurring opinion by Powell, J.). The deceptively broad reference to "passengers" was simply wrong. It should, more carefully, have been a more limited reference to "drivers." That distinction, however, was not remotely involved in the discussion and should not be given a significance that was never intended.

The same sort of inadvertent mistake infected our opinion in *Derricott v. State*. As we worked our way toward the critical issue actually before us in that case, we described, almost as passing landscape, the unquestioned legitimacy of an initial traffic stop and then the unquestioned legitimacy of ordering the stopped driver to alight from his vehicle. Clearly, we were not dealing with any distinction between a driver and a passenger, because there was no passenger in the Derricott vehicle. No one other than the driver was involved. Nonetheless, our characterization of *Pennsylvania v. Mimms* did read:

> *Pennsylvania v. Mimms* established unequivocally that when the police have legitimately stopped an automobile, for a traffic offense or for any other reason,

> they are automatically entitled to order the driver *and/or any of the passengers* to alight from the vehicle. (Citation omitted.) (Emphasis supplied.)

84 Md.App. at 197-98, 578 A.2d 791. The overly broad inclusion of the phrase "and/or any of the passengers" was simply wrong. *Pennsylvania v. Mimms* did not stand for so broad a proposition.

The writer of the concurring opinion in *Rakas* and the writer of this Court's opinion in *Derricott* did exactly the same thing, as opinion writers sometimes do. On an immaterial issue and casually in passing, they characterized *Pennsylvania v. Mimms* as they remembered it, but they remembered it wrongly. They did not put down a pen in mid-sentence and run to the United States Reports for the obvious reason that the passing reference was not in any way the focus of consideration. To be sure, a judge said the words. The words, however, in such a context, should be given the weight they would be given if the judge had said them in a law review article or in a newspaper column or in a talk to the Kiwanis Club. In this same regard, *see also Harris v. State*, 81 Md.App. 247, 300, 567 A.2d 476 (1989), *rev'd on other grounds*, *Harris v. State*, 324 Md. 490, 597 A.2d 956 (1991).

In summation, *stare decisis* is ill served if readers hang slavishly on every casual or hurried word as if it had bubbled from the earth at Delphi. *Obiter dicta*, if noticed at all, should be taken with a large gain of salt.[1]

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[1] Incredibly, several jurisdictions have apparently extended the *Mimms* automatic police prerogative to passengers simply by relying on this *dicta* from *Rakas v. Illinois* and *Michigan v. Long*. *United States v. McCoy*, 824 F.Supp. 467 (D.Del.1993); *State v. Soares*, 648 A.2d 804 (R.I.1994). This is not to say that, by random chance, they may not have hit on a proper resolution. It is a close question that could easily go

(continued...)

B. The Argument Based on Logic:

In urging that the *Mimms*-based police prerogative *vis-a-vis* a stopped driver should be extended to cover passengers in a stopped vehicle as well, the State is on much firmer ground as it makes its argument based on the inherent logic of the parallel. In deciding *Mimms* as it did, the Supreme Court engaged in a balancing exercise. It measured the governmental or societal interest that would be furthered by the prerogative against the privacy interest that would be compromised by it. On balance, it deemed the prerogative, *vis-a-vis* a driver, to be reasonable.

The same general factors would go into the weighing process of whether it would be reasonable automatically to subject a passenger to the same police procedure. We accept the State's invitation to engage in such a weighing exercise. We point out, as we do so, that we are assessing the reasonableness of subjecting a passenger to the *automatic* police prerogative of ordering him out of an automobile, just as automatically as in the case of the driver, and not to such a prerogative when conditioned on some sort of particularized or individualized suspicion.

On the societal-interest pan of the balance scale, the Supreme Court placed two factors. The heavy factor was the interest in protecting the officer from harm at the hands of the driver. A secondary factor was the interest in protecting the officer from the risk of harm from oncoming traffic. In referring to that secondary factor, the Court observed:

> The hazard of accidental injury from passing traffic to

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[1](...continued)
either way. This is only to say that the avenue by which they arrived at their resolution (or the rationale seized upon to explain it) was analytically flawed.

> an officer standing on the driver's side of the vehicle may also be appreciable in some situations. Rather than conversing while standing exposed to moving traffic, the officer prudently may prefer to ask the driver of the vehicle to step out of the car and off onto the shoulder of the road where the inquiry may be pursued with greater safety to both.

Mimms, 434 U.S. at 111, 98 S.Ct. at 333.

Assuming that stopped vehicles generally pull to the right-hand curb of the street or the right-hand shoulder of the road and that it is the driver's side that is thereby exposed to traffic, this factor obviously does not come into play when considering the officer's position *vis-a-vis* a passenger. In a routine traffic stop, there would, indeed, be few occasions when an officer would even have any interest in standing outside the passenger's window and talking to a passenger. Since this societal interest, however, was clearly little more than a makeweight, its absence from the balance in the case of a passenger detracts little from the governmental interest being weighed.

The heavy and predominant societal interest that persuaded the Supreme Court to decide *Pennsylvania v. Mimms* as it did was the concern for minimizing the risk of harm to an officer from an armed and dangerous driver:

> Establishing a face-to-face confrontation diminishes the possibility, otherwise substantial, that the driver can make unobserved movements; this, in turn, reduces the likelihood that the officer will be the victim of an assault.
>
> We think it too plain for argument that the State's proffered justification–*the safety of the officer–is both legitimate and weighty*. "Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." And we have specifically recognized the inordinate risk

confronting an officer as he approaches a person seated in an automobile. "According to one study, approximately 30% of police shootings occurred when a police officer approached *a suspect seated in an automobile*." We are aware that not all these assaults occur when issuing traffic summons, but we have before expressly declined to accept the argument that traffic violations necessarily involve less danger to officers than other types of confrontations. Indeed, it appears "that a significant percentage of murders of police officers occurs when the officers are making traffic stops." (Footnote and citations omitted.) (Emphasis supplied.)

434 U.S. at 110, 98 S.Ct. at 333.

Assuming the worst-case scenario, as the Supreme Court did with a driver and as we now do with a passenger, it is self-evident that an armed and dangerous passenger poses just as great a threat to an officer as does an armed and dangerous driver. In looking, therefore, exclusively at the "benefit" side of this cost-benefit analysis, we conclude that the societal benefit or societal interest is just as great when considering protecting an officer from a passenger as it is when protecting an officer from a driver.

A balancing process, however, is an exercise in relativity. A cost-benefit analysis requires that we compare the social "costs" to driver and passenger, respectively, just as we have compared the respective benefits of protecting the officer from each of them. It is here that the parallel urged by the State falters. It is here that a significantly heavier weight on the "cost" side of the scale in the case of a mere passenger produces, in our judgment, a different result.

In *Mimms*, the Supreme Court made it very clear that the social cost in terms of interfering with a citizen's liberty interest was a possibly counter-balancing factor

that had to be considered:

> The touchstone of our analysis under the Fourth Amendment is always "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." Reasonableness, of course, depends "on *a balance between the public interest and the individual's right to personal security* free from arbitrary interference by law officers." (Citation omitted.) (Emphasis supplied.)

434 U.S. at 108-09, 98 S.Ct. at 332.

Apparently critical to the Supreme Court's decision that a police officer's prerogative to order a stopped driver out of a car could be automatic rather than conditioned on some showing of particularized suspicion was its conclusion that the social "cost" in terms of interfering with the driver's liberty interest was minimal, if not nugatory. Not only is the automobile itself stopped for a traffic infraction, but the driver is subject to further detention on an *in personam* basis. The driver is not permitted to walk away from the scene and disappear into the sunset. The driver is required to furnish the officer with evidence of a valid operator's license and valid registration for the vehicle, subject to penalties for failure to do so. The driver is further detained while the officer checks out the identifying data over a police radio. The driver is subject to receiving a traffic ticket or citation, if not, indeed, to custodial arrest for the infraction. All this is well settled law before the *Pennsylvania v. Mimms* considerations even come into play. With the detention of the driver already an undisputed *fait accompli*, the small incremental intrusion of having him alight from the vehicle while being detained was considered by the Supreme Court to be absolutely *de minimis*:

> Against this important interest we are asked to weigh the intrusion into the driver's personal liberty occasioned not by the initial stop of the vehicle, which

was admittedly justified, but by the order to get out of the car. We think *this additional intrusion can only be described as de minimis*. The driver is being asked to expose to view very little more of his person than is already exposed. *The police have already lawfully decided that the driver shall be briefly detained*; the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it. Not only is the insistence of the police on the latter choice not a "serious intrusion upon the sanctity of the person," but *it hardly rises to the level of a* " *'petty indignity.'* " What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety. (Citation and footnote omitted.) (Emphasis supplied.)

434 U.S. at 111, 98 S.Ct. at 333.

A police interference with the presumptively unfettered liberty of a mere passenger, by contrast, cannot so easily be dismissed as "*de minimis*" or as something "hardly ris[ing] to the level of a petty indignity." The passenger has not committed any wrongdoing, even at the level of a traffic infraction. The passenger may not be issued a traffic ticket or citation, let alone subjected to custodial arrest. The passenger is not required to furnish identification or any other documentation. Once the automobile has slowed down sufficiently for the passenger safely to alight, moreover, the passenger is subject to no mandatory detention whatsoever. The passenger is presumptively free to abandon the driver to the clutches of the law and to hail a cab.

Under the circumstances, a police intrusion on the Fourth Amendment interest of the passenger is not so minimal or merely incremental as to be of no more than slight significance in the weighing operation. To order a passenger to stay in the car or to get out of the car is the imposition of detention *per se*, and not a mere shift of the

location of already established detention.

The interest in officer safety, to be sure, continues to loom large, and this is admittedly a close question. All warrantless activity, however, is presumptively invalid, *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.E.2d 576 (1967); *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), and the burden is on the State to persuade us that it is reasonable. The State has not persuaded us that the automatic police prerogative, under *Pennsylvania v. Mimms*, to order a driver out of a vehicle should be extended to a passenger–*on an automatic basis*. That is the only issue before us in this case. Because Trooper Hughes's right to order Wilson out of the car was not automatic, the ruling of Judge Bollinger that the evidence be suppressed is affirmed.

Of a like mind on this issue is Professor Wayne LaFave, *Search & Seizure: A Treatise on the Fourth Amendment*, § 9.4(a) at 514-15 (2d ed. 1987):

> The state court in *Mimms* relied upon the earlier decision in *Commonwealth v. Pollard* [450 Pa. 138, 299 A.2d 233 (1973)], holding that when a vehicle is stopped for a traffic violation the police may not, by virtue of the stop alone, order the passengers in the vehicle to get out of the car. Although the issue presented by a *Pollard*-type fact situation is by no means an easy one, it would seem that *Pollard* was correctly decided and ought to be distinguished from *Mimms*. For one thing, it may fairly be said that "an operator's expectation of privacy differs from that of an occupant of a vehicle detained for a traffic violation," as the driver is detained for some violation by him or the car he is driving, while the detention of the passengers is no more than an inevitable incident of the stopping of the car. But more important, the potential danger to police engaged in traffic enforcement could be

adequately met if the police allowed passengers to remain in the stopped vehicle and instead had the driver accompany them to the police vehicle while the citation is prepared. (Footnotes omitted.)

See also Pennsylvania v. Mimms, 471 Pa. 546, 370 A.2d 1157, 1161 n. 1 (1977) (concurring opinion by Nix, J.), interpreting *Pennsylvania v. Pollard*, 450 Pa. 138, 299 A.2d 233 (1973):

> Our holding in that case was clearly limited to *passengers* occupying a vehicle. ("Further, as was previously noted, appellant was not the driver of the automobile.") The majority in the case at bar ignores this distinction, and thus completely overlooks the question left open in *Pollard* of whether an operator's expectation of privacy differs from that of an occupant of a vehicle detained for a traffic violation. (Emphasis in original.) (Citation omitted.)

In *State v. Becker*, 458 N.W.2d 604, 607 (Iowa 1990), the Supreme Court of Iowa very articulately contrasted the situation of a driver, following a traffic stop, with the situation of a passenger:

> Nothing in either *Eis* [*State v. Eis*, 348 N.W.2d 224 (Iowa 1984)] or *Mimms* suggests that the privacy rights of the driver and passenger are the same at that stage. The pronouncements in *Mimms* concerning enhancement of the officer's safety were within the context of action which might be taken against a driver known to the officer to have violated the traffic laws. A person in that position is, in many states, including Iowa, technically subject to full custodial arrest. To the extent the officer elects to temporarily pursue a lesser intrusion, he has the right to condition that election on certain aspects of detention and search which are conducive to the officer's safety.
>
> The situation of the passenger, on the other hand, is entirely different. The fact that the driver was speeding

> authorizes the officer to stop the vehicle in which the passenger is riding. The resulting intrusion on the passenger which flows from the initial stop is an unavoidable consequence of action justifiably taken against the driver. Further intrusion on the passenger is not justified, however, unless some articulable suspicion exists concerning a violation of law by that person. (Citations omitted.)

See also Johnson v. State, 601 S.W.2d 326, 327-28 (Tenn.Crim.App.1980); *State v. Williams*, 366 So.2d 1369 (La.1978), *overruled by State v. Landry*, 588 So.2d 345 (La.1991).

Indeed, in *New York v. Class*, 475 U.S. 106, 117-18, 106 S.Ct. 960, 967-68, 89 L.E.2d 81, 92-93 (1986), the Supreme Court strongly suggested that its vesting a police officer with the automatic prerogative of ordering a driver out of a stopped car rested on three factors, one of which was the focusing of suspicion of wrongdoing specifically on the driver:

> In *Pennsylvania v. Mimms, the officers had personally observed the seized individual in the commission of a traffic offense before requesting that he exit his vehicle....* All three of the factors involved in *Mimms* and *[Michigan v.] Summers* [452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed. 2d 340 (1981)] are present in this case: the safety of the officers was served by the governmental intrusion; the intrusion was minimal; and *the search stemmed from some probable cause focusing suspicion on the individual affected by the search.* (Citations omitted.) (Emphasis supplied.)

By contrast, a traffic stop *per se* does not, without more, focus suspicion on a passenger as either a wrongdoer or as a possible source of danger to the officer.

A number of state courts, to be sure, have gone in the opposite direction on this issue and have extended the automatic police prerogative to the passenger as well as

the driver. Most have gone through the formal exercise of balancing the governmental interest in police safety against the degree of intrusion with the right of the passenger, although the analysis, generally speaking, has been very skimpy. *State v. Landry*, 588 So.2d 345, 347 (La.1991); *State v. Gilberts*, 497 N.W.2d 93, 95-96 (N.D.1993); *State v. Ferrise*, 269 N.W.2d 888, 890-91 (Minn.1978); *Warr v. State*, 580 N.E.2d 265, 267 (Ind.App.1991); *People v. Salvator*, 236 Ill.App.3d 824, 177 Ill.Dec. 58, 68, 602 N.E.2d 953, 963 (1992); *People v. Martinez*, 187 Mich.App. 160, 466 N.W.2d 380, 383-84 (1991), *vacated on other grounds*, *People v. Martinez*, 439 Mich. 986, 483 N.W.2d 868 (Mich.1992). A Florida appellate court reached the same conclusion without the benefit of any apparent analysis. *Doctor v. State*, 573 So.2d 157, 159 (Fla.App.1991).

Several decisions from the New York Court of Appeals leave New York's position somewhat in doubt. *People v. Robinson*, 74 N.Y.2d 773, 545 N.Y.S.2d 90, 91, 543 N.E.2d 733, 734 (1989), stated, without elaboration, that the *Pennsylvania v. Mimms* prerogative extended to passengers as well as to drivers. Its primary reliance, however, was on *People v. McLaurin*, 70 N.Y.2d 779, 521 N.Y.S.2d 218, 219-20 515 N.E.2d 904, 905-06 (1987), a case that explicitly refrained from holding that the prerogative was automatic and that based the propriety of the police order in that case on specific facts articulated by the police officer which warranted heightened apprehension on his part:

> *We need not now resolve whether the Mimms rationale would always justify an officer in ordering any or all of the passengers out of a lawfully stopped car,* for this record reveals that *the police conduct at issue here was predicated* not only on the traffic violation and the perceived threat of danger from the driver, but also *on the combination of additional factors*

> *that warranted apprehension as to the defendant passenger as well.* (Emphasis supplied.)

Virginia also appeared initially to be in the automatic extension of the police prerogative camp, but has since backed away from that position. In *Bethea v. Commonwealth*, 14 Va.App. 474, 419 S.E.2d 249, 250-51 (1992), the Court of Appeals of Virginia appeared to extend the prerogative to passengers automatically. On appeal, however, the Supreme Court of Virginia, in *Bethea v. Commonwealth*, 245 Va. 416, 429 S.E.2d 211, 213 (1993), expressly refrained from any automatic extension and rested its affirmance on the officer's actions on his ability to "point to specific and articulable facts" that justified his order for the passenger to alight from the vehicle:

> Nevertheless, *we need not determine whether the de minimis rationale utilized in Mimms is applicable to a passenger* in a vehicle when the initial vehicle stop is predicated solely on matters pertaining to the driver. The facts of this case only require the application of the more general principle that *Fourth Amendment interests are not violated when a police officer can "point to specific and articulable facts which,* taken together with rational inferences from those facts, *reasonably warrant that intrusion."* (Emphasis supplied.)

What We Are Not Holding

By way of conscious, considered, and deliberate *dicta*, we hasten to point out what we are not holding. We are not holding that a police officer, as a matter of personal safety, may not order a suspect passenger out of a stopped automobile as readily as he may frisk a suspect on the street or in an automobile, and perhaps even more readily. We are simply holding that the prerogative is not automatic, but requires, for justification, some

individualized or particularized suspicion—just as in the case of a frisk for weapons. Where officer safety is concerned, the reasonableness threshold is low, but there is a threshold.

Of all the opinions we have found dealing with the distinction between the vulnerability of a driver to an order to alight from a car and the vulnerability of a passenger to the same order, far and away the most thoughtful and sensitive analysis is that of the Supreme Court of New Jersey, in *State v. Smith*, 134 N.J. 599, 637 A.2d 158 (1994). The New Jersey Supreme Court recognized, as we have done, that the danger posed to an officer is just as great at the hands of a passenger as at the hands of a driver. It is on the "cost" side of the balance scale that a difference is found. With respect to the greater intrusion that occurs in the case of a passenger, the *Smith* opinion reasoned:

> We turn now to the second prong of the *Mimms* analysis and weigh the intrusion into the passenger's liberty occasioned by the trooper's order to a passenger to get out of the car as a routine safety precaution. *Ordering a passenger to leave the vehicle is distinguishable from ordering the driver to get out of the vehicle because the passenger has not engaged in the culpable conduct that resulted in the vehicle's stop.* Although the State's interest in safety remains the same whether the driver or the passenger is involved, requiring a passenger to alight from a car in the course of a routine traffic stop represents a greater intrusion on a passenger's liberty than the same requirement does on a driver's liberty. With respect to the passenger, *the only justification for the intrusion on the passenger's privacy is the untimely association with the driver* on the day the driver is observed committing a traffic violation. Because the passenger has not engaged in culpable conduct, the passenger has a legitimate

> expectation that no further inconvenience will be occasioned by any intrusions beyond the delay caused by the lawful stop. *The intrusion on the passenger's privacy*, therefore, *is greater than it is on the driver's privacy.* (Emphasis supplied.)

637 A.2d at 165-66.

The *Smith* Court recognized that although the intrusion on a passenger was not a major intrusion, it was enough to require some specific justification under the Fourth Amendment:

> [T]he primary concern of the *Mimms* rule–officer protection–remains the same whether a passenger or a driver is involved.
>
> ... Applying the balancing test to passengers, however, we conclude that the scale tips against a *per se* rule that a passenger may always be ordered out of a vehicle lawfully stopped for a routine traffic violation. Courts have long held that some quantum of individualized suspicion is a prerequisite to a constitutional search and seizure. Although we do not think that a passenger being routinely asked to step out of a lawfully detained vehicle suffers a major intrusion, the request nevertheless amounts to an intrusion. Therefore, we do not think reasonable the proposition that auto passengers should be routinely ordered to get out of their cars after ordinary traffic stops.
>
> Hence, we conclude that the *Mimms per se* rule should not be applied automatically to passengers. (Citations omitted.)

637 A.2d at 166.

In turning its attention to the relatively low threshold of justification required to order a passenger out of a car, the *Smith* opinion reasoned that that justification might well be less than, and different from, the articulable suspicion that a crime was occurring, so as to justify a *Terry* "stop," or the articulable suspicion that the passenger was armed

and dangerous, so as to justify a *Terry* "frisk":

> We do recognize, however, that instances will surface in which police officers, with less than a reasonable suspicion that a passenger is engaged in criminal activity or is armed and dangerous, may reasonably order a passenger to step out of the car.

637 A.2d at 166.

What must be articulated to justifying ordering a passenger out of a car are specific and articulable facts that would support a "heightened caution" that the traffic stop was fraught with danger:

> Although the *per se* rule under *Mimms* permits an officer to order the driver out of a vehicle incident to a lawful stop for a traffic violation, we decline to extend that *per se* rule to passengers. Instead, we determine that *an officer must be able to point to specific and articulable facts that would warrant heightened caution* to justify ordering the occupants to step out of a vehicle detained for a traffic violation. (Emphasis supplied.)

637 A.2d at 167.

The *Smith* Court made it clear, moreover, that a reasonable sensing of the need for "heightened caution," although constituting particularized suspicion, does not necessarily have to rise to the level of articulable suspicion necessary for a *Terry* "frisk":

> Although the requirements for ordering a passenger from a vehicle are more stringent than those for ordering a driver out under the *Mimms per se* rule, *the standard that justifies an order to a passenger to step out of a vehicle does not rise to the Terry standard that must be met for a protective pat-down.* We adopt this lesser standard because of the need to protect police officers and because of the minimal intrusion the requirement to exit the car imposes on the passenger.
>
> To support an order to a passenger to alight from a vehicle stopped for a traffic violation, therefore, the officer need not point to specific facts that the occupants are "armed and dangerous." Rather, the officer need point only to *some fact or facts* in the totality of the circumstances *that would create in a police officer a heightened awareness of danger that would warrant an objectively reasonable officer in securing the scene in a more effective manner by ordering the passenger to alight from the car.* (Emphasis supplied.)

637 A.2d at 167.

As it upheld the officer's ordering of the defendant-passenger out of the car, the *Smith* opinion provided an illustrative checklist of those types of observations that, although possibly falling short of articulable suspicion for a *Terry* "frisk," would justify the exercise of heightened caution in ordering a passenger out of a car:

> Had the vehicle pulled to the side of the road without incident, the trooper would have had no basis for requiring the passenger to step out of the car. Here, however, Trooper Cacina [sic] witnessed the apparent passing of objects between the front and back seats. Gacina testified that while following the car as it pulled to the shoulder, he "did not have a view of the most important thing that [he] needed to have a view of; and that is [the occupants'] hands."
>
> Thus the unusual movements, the early morning hour, and a largely deserted Turnpike are facts that warrant proceeding with extra caution in handling the occupants of the vehicle. The suspicious behavior by the occupants permitted the officer to exercise increased care to secure the scene even though the order that the passenger step out of the vehicle involved some intrusion on the passenger. That intrusion on the passenger's privacy interest is justified, however, because the suspicious movements in the car warranted a reasonably prudent officer's belief that the occupants

of the car might be armed. Trooper Cacina [sic] thought that he would best be able to control the scene if each of the passengers stepped out of the vehicle and remained in complete view of the officers. *Those circumstances were sufficient to justify Trooper Cacina's [sic] exercise of heightened caution in ordering Muhammad to step out of the car.* (Emphasis supplied.)

637 A.2d at 168.

In *People v. McLaurin*, 70 N.Y.2d 779, 521 N.Y.S.2d 218, 515 N.E.2d 904 (1987), the New York Court of Appeals found of significance in this regard the facts 1) that the area where the car was stopped was abandoned, 2) that the hour was late, and 3) that the car was moving slowly with no lights on:

Here, the area was abandoned, the hour was late, and the fact that the vehicle–having already violated the speed limit–was moving slowly with no lights on was sufficiently peculiar to awaken suspicion as to the activity of the occupants. *Under these circumstances, the officer was justified* in acting to secure the safety of both officers by imposing upon defendant the *de minimis* intrusion of ordering him–a person whose progress had already been impeded as a necessary incident to the lawful stop of the vehicle–to step out while his partner investigated the driver's credentials. (Citation omitted.) (Emphasis supplied.)

521 N.Y.S.2d at 220, 515 N.E.2d at 906.

In *Bethea v. Commonwealth*, 245 Va. 416, 429 S.E.2d 211 (1993), the Supreme Court of Virginia discussed the "specific and articulable facts" that caused the stopping officer in that case to be "reasonably concerned for his safety":

The totality of the circumstances we consider here included a traffic stop in a high-crime area; similar traffic stops by the same officers two days earlier in the

same neighborhood where weapons were discovered in a car; Bethea's actions immediately prior to the stop; Warren's 22 years of experience and his statements that Bethea's actions "startled" and "scared" him; and Warren's concern that Bethea might have weapons in the car. *These circumstances constitute "specific and articulable facts" which show that Warren was reasonably concerned for his safety* and believed that Bethea might have had access to weapons with which to assault him. These facts justified the intrusion on Bethea's Fourth Amendment rights that occurred when Warren asked him to get out of the car.

The fact that Warren did not immediately pat down or frisk Bethea does not belie Warren's concern for his own safety, as Bethea contends. *Warren stated that he felt safer with Bethea outside the vehicle,* not only because of Bethea's behavior, but also *because of his concern that there might be weapons in the car.* (Citation omitted.) (Emphasis supplied.)

429 S.E.2d at 213-14. *See also State v. Reynolds*, 753 S.W.2d 1, 2 (Mo.App.1988).

In *Search & Seizure: A Treatise on the Fourth Amendment*, § 9.4(a) at 516 (2d ed. 1987), Professor Wayne LaFave suggests two factors that may establish heightened suspieion that a passenger may be dangerous. One is suspicious movement on the part of the passenger. Another is where the stop is not for a routine traffic infraction but for more serious criminal activity, which may, *ipso facto*, be reasonable grounds to take preventive action with respect to the passengers as well as the driver:

But *where the car has been stopped because of a suspicion of more serious criminal activity involving use of that vehicle, there may be greater reason to require the passengers to alight.* In *United States v. Hensley*, where a car was stopped because of a flyer from another police department indicating the driver

was wanted for investigation of robbery and should be considered armed and dangerous, the Court summarily concluded that the officer's conduct in having both the driver and his passenger step out of the car was "well within the permissible range." Even if the suspected offense is not serious, *ordering a passenger out of the car for purposes of self-protection may sometimes be justified by the suspicious movements of the passenger.* (Footnotes omitted.) (Emphasis supplied.)

See also United States v. Hensley, 469 U.S. 221, 224, 105 S.Ct. 675, 677, 83 L.Ed.2d 604, 609 (1985).

The issue of whether these are appropriate guidelines, however, is not before us. Judge Bollinger made no ruling that the circumstances in this case would not be sufficient, as a matter of constitutional law, to justify a sense of apprehension on the part of Trooper Hughes and appropriate preventive action by him. We are, therefore, intimating nothing as to whether, under appropriate circumstances, we would follow the reasoning of a case such as *State v. Smith*.

We are not holding, therefore, that the observations of Trooper Hughes in our case might not, under a set of guidelines similar to those used by *State v. Smith*, have constituted a reasonable justification for a sense of heightened caution or apprehension on the trooper's part and for his order for Wilson to alight from the car as a result thereof. No ruling in that regard was ever made or is before us for review. Judge Bollinger's finding, which was not clearly erroneous, was that Trooper Hughes did not act out of any such sense of apprehension. His suppression ruling, therefore, based on his findings of fact, was not in error.

ORDER TO SUPPRESS EVIDENCE AFFIRMED; COSTS TO BE PAID BY BALTIMORE COUNTY.

APPENDIX B

STATE OF MARYLAND	*	IN THE
v.	*	CIRCUIT COURT
JERRY L. WILSON	*	FOR BALTIMORE COUNTY
Defendant	*	CASE NO. 94 CR 02601

* * * * * * *

OPINION AND ORDER

This matter came before the Court for hearing on Motion to Suppress filed by the Defendant. Testimony was taken and arguments were heard on November 23, 1994.

The State produced Trooper Hughes of the Maryland State Police, who testified that on June 8, 1994 at approximately 7:30 p.m. he observed a 1994 Nissan Maxima with no apparent tags traveling at what appeared to be a high rate of speed. Trooper Hughes then paced the vehicle for a mile to a mile and a half, and observed the vehicle going 64 m.p.h. in a 55 m.p.h. zone on Interstate 95 (where, in this Court's opinion, no one goes 55 m.p.h.), and then further observed that this vehicle was an Enterprise Rent-A-Car with a paper tag. Three occupants were observed in the vehicle when Trooper Hughes executed a stop of the vehicle. The trooper further testified that the back seat passenger and the front seat passenger turned and looked at the trooper four or five times, their heads went up and down four or five times, and they looked "furtively." It was on this basis that the

trooper requested the driver, Mr. McNichol, to exit the car; Mr. McNichol then produced his driver's license without incident and presented it to Trooper Hughes. Mr. McNichol then informed the trooper that the rental papers were back in the vehicle, and the trooper allowed Mr. McNichol to re-enter the vehicle to obtain the rental papers. The trooper then ordered the right front passenger, Mr. Wilson, the movant in these proceedings, to exit the vehicle, at which time the trooper observed suspected a [sic] controlled dangerous substance after Mr. Wilson's compliance with the trooper's order to exit.

The Assistant State's Attorney in this action argues that Pennsylvania v. Mimms, 98 S.Ct. 330 (1977) is binding upon this Court. In this case the Supreme Court reversed the Supreme Court of Pennsylvania and held that a Philadelphia police officer was properly in his rights to ask Mr. Mimms to step out of his car after being stopped for the purposes of being issued a traffic summons. When Mr. Mimms alighted the officer noticed a large bulge under Mr. Mimms' jacket and, fearing that it might be a weapon, he frisked Mr. Mimms and found a loaded revolver. Mr. Mimms and the other occupant of the car, who was also carrying a revolver, were arrested. The Supreme Court believed that this search was justified on the basis of officer safety, and that it was a de minimis intrusion to ask the driver to step out of the car.

This Court does not find the facts of Pennsylvania v. Mimms to be the factual scenario in this case. In this case the Defendant Wilson was not the driver of the automobile, but a passenger; and, as the Supreme Court said in Pennsylvania v. Mimms at Footnotes 5 and 6, the Court is not holding that an officer may frisk the occupant of any car stopped for a traffic violation but only holds that it is permissible to order the driver out of the car. The Court did not hold whenever an officer has a [sic] occasion to speak with the driver of a vehicle the officer

may order all occupants out of the car, but only the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures.

In addition, the State argues that Derricott v. State, 327 Md. 582 (1992) was reversed on other grounds. In this case Judge McAuliffe, writing for the Court of Appeals, reversed the judgment of the Court of Special Appeals with respect to stopping the automobile and searching the occupants. Mr. Stocksdale, the Assistant State's Attorney, and this Court must not be reading the same case, as the State seriously contends that this case was reversed on other grounds. Clearly, the Court of Appeals held that a police officer needed reasonable suspicion supported by articulable facts that criminal activity may be afoot. The Court of Appeals stated that the inchoate and unparticularized suspicion or hunch of the officer was not to be the basis for believing that his safety was in danger. There must be specific reasonable inferences which the officer is entitled to draw from the facts in light of experience. In this case the officer's experience is 13 months as a trooper and this Court finds that when the officer allowed the driver of the vehicle to return to the car to obtain the rental documents he could not have had a reasonable suspicion that the person was armed and dangerous; and, therefore, any future intrusion into the right of the occupants of the car are [sic] violative of one's Fourth Amendment proscription of unreasonable searches and seizures.

In view of the above, on this 10th day of January, 1995 the Motion to Suppress items seized from Mr. Wilson is hereby GRANTED.

/s/
THOMAS J. BOLLINGER, JUDGE

TJB/am

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APPENDIX C

STATE OF MARYLAND	*	In the
	*	Court of Appeals
v.	*	of Maryland
	*	Petition Docket No. 366
JERRY WILSON	*	September Term, 1995 (No. 113, September Term 1995, Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari and the supplement to the Court of Special Appeals, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition and supplement be, and they are hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

ROBERT C. MURPHY
Chief Judge

Date: November 22, 1995

APPENDIX D

IN THE COURT OF
SPECIAL APPEALS OF MARYLAND

STATE OF MARYLAND,	*	
Appellant	*	
v.	*	No. 113
JERRY LEE WILSON,	*	September Term, 1995
Appellee	*	

* * * * * * *

ORDER

For reasons to be recited in an Opinion to be filed hereafter, it is, by the Court of Special Appeals this 17th day of July, 1995,

ORDERED, That the order of the Circuit Court for Baltimore County granting appellee's motion to suppress is AFFIRMED. Costs to be paid by Appellant. Mandate to issue forthwith.

FOR A PANEL OF THE COURT
(Judges Wilner, Moylan and Harrell) :

/s/
CHIEF JUDGE

Supreme Court, U.S.
FILED
MAY 2[illegible] 1996
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

No. 95-1268

October Term, 1995

State of Maryland,

Petitioner,

v.

Jerry Lee Wilson,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS WITH AFFIDAVIT OF INDIGENCY BY RESPONDENT'S FATHER

Pursuant to Rule 39 of the Supreme Court, Jerry Lee Wilson moves for leave to proceed in forma pauperis in filing the attached Petition in Opposition to Petition for Certiorari without prepayment of costs. Counsel for Respondent states the following in support of said motion:

1. This firm has tried on numerous occasions to contact the Respondent.

2. On each such occasion, this firm has been unable to locate the Respondent.

3. This firm was able to contact Respondent's father by mail, and received from Respondent's father, an Affidavit in support of Motion to Proceed in Forma Pauperis, attached, received May 20, 1996, attesting to Respondent's inability to pay the costs of this proceeding.

4. During the Respondent's pretrial motion at the Circuit Court for Baltimore County

as well as in the Petitioner's appeal to the Court of Special Appeals of Maryland, the Respondent was represented by the law firm of Turnbull, Mix & Farmer, which at all times represented the Respondent zealously and effectively.

5. At the conclusion of the appeal before the Court of Special Appeals of Maryland, the law firm of Turnbull, Mix and Farmer sent at least five letters to the Respondent or his family in an attempt to discuss the nature of the Respondent's case as well as inquire as to payment of attorney's fees. No response was received from the Respondent.

6. Due to the Respondent's nonpayment of fees and failure to contact his counsel, the law firm of Turnbull, Mix & Farmer was forced to terminate representation of the Respondent, with outstanding bills totaling approximately $5,000.

7. The Respondent was not represented by counsel in connection with the State of Maryland's Petition for Certiorari to the Court of Appeals of Maryland.

8. At no time has the Respondent attempted to contact this firm or Turnbull, Mix & Farmer in connection with his previous or pending cases.

9. Despite numerous attempts by this firm as well as his previous counsel, any efforts to communicate with the Respondent have been to no avail.

10. Due to the Respondent's lack of correspondence or communication, this firm has only been able to obtain an affidavit from the Respondent's Father in support of said Motion.

11. Leave to proceed in forma pauperis was not sought by the Respondent in any other court.

For the foregoing reasons, Respondent Jerry Lee Wilson respectfully urges this Court to grant said Motion for Leave to Proceed in Forma Pauperis.

Respectfully submitted,

Professor Byron L. Warnken
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School of Law
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Baltimore, Maryland 21202-5779
(410) 837-4640

IN THE SUPREME COURT OF THE UNITED STATES

No. _____

October Term, 1995

State of Maryland,

Petitioner,

v.

Jerry Lee Wilson,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, ROBERT WILSON, being first duly sworn, depose, and say that I am the father or the respondent in the above titled case. In support of my son's motion to proceed on appeal, without being required to prepay fees, costs or give security therefore, I state that because of his poverty, he is unable to pay the costs of the proceeding or give security therefore.

I DO SOLEMNLY DECLARE AND AFFIRM, under the penalties of perjury, that the matters and facts set forth herein are true to the best of my personal knowledge and information.

Robert Wilson

Robert Wilson

Date 5-18-96

IN THE SUPREME COURT OF THE UNITED STATES

No. 95-1268

October Term, 1995

State of Maryland,

Petitioner,

v.

Jerry Lee Wilson,

Respondent.

CERTIFICATE OF SERVICE

This is to certify that the Motion for Leave to Proceed in Forma Pauperis with affidavit of Indigency of Respondent's Father, in the case of State of Maryland v. Jerry Lee Wilson, No. 95-1268, October Term, 1995, in the Supreme Court of the United States, was mailed first class, postage prepaid, to Gary E. Bair, Esq., Assistant Attorney General, Office of the Attorney General, 200 Saint Paul Place, Baltimore, Maryland, 21202, on this 20th day of May, 1996.

Professor Byron L. Warnken
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(410) 837-4640

Counsel for Respondent

IN THE SUPREME COURT OF THE UNITED STATES

No. 95-1268

October Term, 1995

State of Maryland,

Petitioner,

v.

Jerry Lee Wilson,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

***Professor Byron L. Warnken**
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Counsel for Respondent

*** Counsel of Record**

QUESTION PRESENTED

When a police officer makes a lawful traffic stop, does the officer's automatic right to order the driver to exit the vehicle, pursuant to *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), extend to passengers in the stopped vehicle?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 95-1268

October Term, 1995

State of Maryland,

Petitioner,

v.

Jerry Lee Wilson,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

Respondent, Jerry Lee Wilson, respectfully requests that this Court deny the petition for a writ of certiorari of Petitioner, the State of Maryland.

STATEMENT OF THE CASE

The Respondent accepts the Statement of the Case as presented by the State of Maryland, with the following exceptions:

The State of Maryland, in paragraph two of the Statement of the Case, claims that Officer Hughes witnessed "constant movement by the front and rear seat passengers," and further, that the passengers "continuously ducked below the seat level and then reappeared."

Petition at 3. However, as explained by the Honorable Charles E. Moylan, Jr., writing for a unanimous Court of Special Appeals of Maryland, Officer Hughes noticed only that the passengers of the vehicle had on "several occasions" ducked below the seat in the vehicle. *State v. Wilson*, 106 Md. App. 24, 27, 664 A.2d 1 (1995). Moreover, the State claims that "Hughes continued to see a lot of movement in the car, which made him hesitant to approach it." Petition at 3. However, no evidence exists in the record that either: (1) Officer Hughes witnessed a lot of movement in the car after the vehicle had pulled over, or (2) Officer Hughes was in any way hesitant to approach the vehicle once it had pulled over. 106 Md. App. at 27-28. Finally, the State explains that the Respondent exited the vehicle upon the officer's request only "[a]fter initially refusing to comply with the officer's request." Petition at 4. However, no such evidence exists that Respondent ever initially refused to obey Officer Hughes.

REASONS FOR DENYING THE WRIT

I. THE OPINION OF THE COURT OF SPECIAL APPEALS OF MARYLAND IS NOT CONTRARY TO SUPREME COURT PRECEDENT.

The State of Maryland, in requesting that a Writ for Certiorari be issued to the Court of Special Appeals of Maryland, has asserted that Judge Moylan's opinion is contrary to precedent of this Court. Petition at 8-10. That assertion is incorrect. Contrary to the State's suggestion, Judge Moylan's opinion completely comports with Supreme Court precedent. Judge Moylan (1) correctly analyzes *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), *Rakas v. Illinois*, 439 U.S. 128 (1978), and *Michigan v. Long*, 463 U.S. 1032 (1983), (2) rectifies a linguistic error that his own court made in *Derricott v. State*, 84 Md.

App. 192, 578 A.2d 791 (1990), *rev'd*, 327 Md. 582, 611 A.2d 592 (1992),[1] and (3) distinguishes *Rakas* and *Long* from *Mimms* and from the case at bar. Judge Moylan's opinion, while chiding this Court for subsequently misstating the narrow *Mimms* holding in its opinions in *Rakas* and *Long*, correctly states that *Mimms*, *Rakas*, and *Long* are as distinguishable to the case at bar as they are to each other. Accordingly, neither *Rakas* nor *Long* should be read as interpreting *Mimms*.

This first reason for denying the writ includes: (1) an analysis of *Pennsylvania v. Mimms*, *Rakas v. Illinois*, and *Michigan v. Long*, (2) an analysis of Judge Moylan's opinion, speaking for the Court of Special Appeals of Maryland, and (3) a demonstration that Judge Moylan's opinion strictly follows, rather than deviates from, Supreme Court precedent.

A. Analysis of *Mimms*, *Rakas*, and *Long*.

1. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam).

The facts of *Mimms*, as they pertain to the issue at bar, are straightforward. Mimms was driving a car with an expired license plate, in violation of Pennsylvania law. *Mimms*, 434 U.S. at 109. When police officers stopped the vehicle in order to issue a traffic summons, an officer approached the car and asked Mimms to alight from the car and produce appropriate documents. *Id.* at 107.

[1] In *Derricott*, the Court of Special Appeals of Maryland used the phrase "and/or any of the passengers" to describe whom police may legitimately order out of a lawfully stopped vehicle. Petition, Appendix A at 14a-15a. In his decision below, in *State v. Wilson*, 106 Md. App. 24, 664 A.2d 1 (1995), Judge Moylan refuted that proposition, explicitly stating that "[t]he overly broad inclusion of the phrase 'and/or any of the passengers' [in *Derricott*] was simply wrong. *Pennsylvania v. Mimms* did not stand for so broad a proposition." Petition, Appendix A at 15a.

At issue in *Mimms* was the officer's order that Mimms alight from the vehicle. This Court framed the *Mimms* issue with specificity, stating that "we need presently deal only with the narrow question of *whether the order to get out of the car, issued* [to the driver] *after the driver was lawfully detained, was reasonable and thus permissible under the Fourth Amendment*," *Mimms*, 434 U.S. at 109 (emphasis added), even though "the officer had no reason to suspect foul play from the particular driver at the time of the stop, there having been nothing unusual or suspicious about his behavior." *Id.* This Court's holding was similarly specific:

> Contrary to the suggestion in the dissent of our Brother Stevens, we do not hold today that 'whenever an officer has an occasion to speak with the driver of a vehicle, he may also order the driver out of the car.' *We hold only that once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures.*

Id. at 111 n.6 (emphasis added).

In reaching its holding, this Court reviewed "'the reasonableness . . . of the particular governmental invasion of a citizen's personal security,'" *Mimms*, 434 U.S. at 109 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)), by "'[balancing] between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" *Mimms*, 434 U.S. at 109 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)). This Court thus balanced society's interest in police officer safety with the its interest in the *driver's* personal liberty, occasioned not by the initial lawful stop, but by the subsequent order to alight from the car.

This Court reasoned that because the officers had "already lawfully decided that the

driver [should] be briefly detained," *Id.* at 111 (emphasis added), any "additional intrusion [could] only be described as de minimis." *Id.* This Court concluded that "[w]hat [was] at most a mere inconvenience [to the driver could not] prevail when balanced against legitimate concerns for the officer's safety," *Id.*, and that, therefore, Mimms's Fourth Amendment rights had not been violated.

For purposes of the case at bar, it is important to note that Mimms was not alone. The Mimms vehicle contained a passenger. After this Court acknowledged the existence of the passenger, when stating that "[t]he other occupant of the car was carrying a .32-caliber revolver," *id.* at 107, there is no further mention of the passenger in the entire opinion. The Court's opinion is bereft of discussion -- much less analysis -- of passengers' Fourth Amendment rights, either alone or when balanced against the needs of law enforcement. Rather, the majority's opinion focuses on the additional intrusion only upon "drivers"[2] and "suspects."[3]

The State of Pennsylvania likewise did not concern itself with the *Mimms* passenger. Pennsylvania argued only "that it [was] permissible to order the *driver* out of the car." *Id.* at 110 n.5 (emphasis added). Only in Justice Stevens's dissent is there any discussion of the rights of passengers in cars that have been legally stopped. *Id.* at 122-23 (Stevens, J., dissenting) ("Because the balance of convenience and danger is no different for passengers in stopped cars, the Court's logic necessarily encompasses the passenger.").

[2]"It was apparently [the officer's] practice to order all drivers out of their vehicles." *Mimms*, 434 U.S. at 109-10. "Establishing face-to-face confrontation diminishes the possibility . . . that the driver can make unobserved movements." *Id.* at 110. There is also reference to "driver side," and to the "driver's personal liberty." *Id.* at 111.

[3]"According to one study, approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile." *Id.* at 110.

The fact that this Court did not address the issue of passengers' Fourth Amendment rights reinforces the view that (1) *Mimms* does not create an automatic right for a police officer to demand that a passenger of a lawfully stopped vehicle exit the vehicle, and, more importantly, that (2) the *Mimms* majority perceived the privacy rights of passengers and drivers to be dissimilar.

2. *Rakas v. Illinois*, 439 U.S. 128 (1978).

In *Rakas,* a police officer on a routine patrol received a radio call notifying him of a robbery, and describing the getaway car. *Rakas*, 439 U.S. at 130. "Shortly thereafter, the officer spotted an automobile which he thought might be the getaway car." *Id.* After following the car, he and other officers stopped the vehicle. There were four occupants in the car, all of whom were ordered out of the car, and all of whom complied. After the occupants left the car, the interior of the car was searched and weapons were seized. *Id.* Rakas did not own the automobile; he was not the driver; and he did not assert a possessory or property interest in the evidence that was seized. *Id.* at 129.

The facts and issues in *Rakas* are so different from those in *Mimms* that they do not, in any way, support a reading of *Mimms* beyond its specific holding. The issue in *Mimms* was whether the officer could order the driver out of his car after the initial legal stop for a traffic violation. The issue in *Rakas* was whether Rakas had standing to challenge the seizure of evidence obtained during a search of a third person's vehicle, absent any showing by Rakas of

either a legitimate expectation of privacy in the area searched, or a possessory or property interest in the automobile and/or the items seized. *Rakas*, 439 U.S. at 128.

After recognizing that "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted," *id.* at 133-34, this Court held that, because Rakas asserted neither a property or a possessory interest in either the automobile searched or any items seized, nor any legitimate expectation of privacy in either the automobile or any place searched, his Fourth Amendment rights had not been violated. *Id.* at 128. Because Rakas's constitutional rights had not even been implicated, Rakas lacked standing to challenge the seizure of the evidence used against him. *Id.*

Mimms and *Rakas* are distinguishable for several reasons, and it is because these cases are distinguishable that no extension of the *Mimms* holding can be found in *Rakas*. First, the factual scenarios differ. *Mimms* involved a routine traffic stop, whereas *Rakas* involved the stopping of a vehicle whose occupants were suspected of a robbery, an inherently dangerous felony. The officers who stopped Mimms had no reason to suspect criminal activity or that Mimms or his passenger posed any danger to them. *Mimms*, 434 U.S. at 109. The *Rakas* stop, however, presented a situation in which the presence of weapons would typically be expected, thus posing a reasonable threat to the officer's safety.

Second, Mimms was a driver who challenged the detention, stop, or "seizure" of his person.[4] Conversely, Rakas was a passenger who challenged the "search and seizure" of property (weapons) taken from a vehicle, all of which belonged to third parties. Third, and

[4] *See United States v. Hensley*, 469 U.S. 221, 226 (1985) ("stopping a car and detaining its occupants constitute a seizure within the meaning of the Fourth Amendment").

most importantly, the entire *Mimms* opinion concerned the constitutionality of the police action in ordering Mimms out of his vehicle. The petitioners in *Rakas*, however, never challenged the constitutionality of being made to get out of the vehicle. This Court was unanimous on this point. *See Rakas*, 439 U.S. at 150-51 (Powell, J., joined by Rehnquist, J. (now C.J.), concurring) ("[Rakas asserted only] that [his] constitutionally protected interest in privacy was violated when the police, after stopping the vehicle and making [him] get out, searched the vehicle's interior"). *See id.* at 161 n.5 (White, J., joined by Brennan, J., Marshall, J., and Stevens, J., dissenting) ("Nor have petitioners chosen to argue that they were 'arrested' in constitutional terms as soon as they were ordered from the vehicle and that the search was a fruit of that infringement on their personal rights"). It is clear that the issue and the holding of *Mimms* were not even remotely applicable to *Rakas*.

Notwithstanding the distinctions between *Mimms* and *Rakas*, and thus the irrelevance of *Mimms* to the issue in *Rakas*, the *Rakas* concurrence, when referring to *Mimms*, stated: "Last Term, this Court determined in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), that *passengers* in automobiles have no Fourth Amendment right not to be ordered from their vehicle, once a proper stop is made." *Rakas*, 439 U.S. at 155 n.4 (Powell, J., joined by Rehnquist, J. (now C.J.), concurring) (emphasis added). What is most confusing about this statement is that passenger rights were not even discussed in the *Mimms* holding. Thus, the *Rakas* concurrence, without discussion or subsequent citation to *Mimms*, sua sponte substituted the word "passengers" for "drivers."

3. *Michigan v. Long*, 463 U.S. 1032 (1983).

In *Long*, after officers observed that Long's vehicle was traveling erratically and at an excessive speed, turned into a side road, swerved off the road, and stopped in a shallow ditch. The officers, upon arriving on the scene to investigate, did not have to order Long out of the car. Instead, "Long, the only occupant of the automobile, [alighted from the car on his own and] met the deputies at the rear of the car. The door on the driver's side of the vehicle was left open." *Long*, 463 U.S. at 1035-36.

This Court granted certiorari "to consider the narrow issue of the authority of a police officer to protect himself by conducting a *Terry*-type *search of the passenger compartment* of a motor vehicle during the lawful investigatory stop of the occupant of the vehicle." *Id.* at 1037 (emphasis added). The issue in *Long*, like the issue in *Rakas*, did not involve the *Mimms* issue. *Long* did not address the constitutionality of requiring a driver or a passenger to get out of a vehicle because Long had already alighted from the vehicle when the officers arrived on the scene.

In *Long*, this Court concluded that during a lawful investigatory stop, and even before a full custodial arrest is made,

> the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts which . . . reasonably warrant' the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

Id. at 1049 (citations omitted). This Court found that the officers had a reasonable belief that Long posed a danger to them if he were permitted to re-enter his vehicle. *Id.* at 1050. This

Court's rationale was based on the holdings of past cases.[5] The Court stated:

> Our past cases indicate that protection of police and others can justify protective searches when police have a reasonable belief that the *suspect* poses a danger, that roadside encounters between police and *suspects* are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a *suspect*.

Long, 463 U.S. at 1049 (emphasis added).

Mimms and *Long* are distinguishable for several reasons. First, the factual scenarios differ. *Mimms* involved a routine traffic stop, while *Long* involved the stopping of a car that had been driven erratically, was speeding, and ended up in a ditch. This is significant because the aggregate facts gave the officers in *Long* cause to suspect that Long was "under the influence" and might pose danger to officer safety. *See id.* at 1032. Second, the issue involved is different. Long did not challenge his "detention" because Long had alighted from the car on his own accord. Instead, Long challenged only the "search and seizure" of his property.

In *Long*, in a fashion similar to *Rakas*, this Court misstated its prior narrow holding announced in *Mimms*. Specifically, the *Long* Court stated: "In *Pennsylvania v. Mimms*, we held that police may order *persons* out of an automobile during a stop for a traffic violation, and may frisk those *persons* for weapons if there is a reasonable belief that they are armed and dangerous." *Long*, 463 U.S. at 1047-48 (citations omitted) (emphasis added). Again, this Court, without discussion or subsequent citation to *Mimms*, sua sponte substituted a different

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[5] The Court analyzed, inter alia, *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), *Adams v. Williams*, 407 U.S. 143 (1972), *Chimel v. California*, 395 U.S. 752 (1969), and *Terry v. Ohio*, 392 U.S. 1 (1968).

word i.e., "persons," for the word "drivers." Not only did the *Long* majority not use the word "drivers," it did not even use the word that the *Rakas* concurrence used, i.e., "passengers."

B. - Analysis of Judge Moylan's Opinion in the Court Below.

Cautioning against "extract[ing] too much meaning from *Pennsylvania v. Mimms,*" Petition at 7a; *State v. Wilson*, 106 Md. App. 24, 664 A.2d 1 (1995), Judge Moylan correctly stated the *Mimms* holding:

> The simple holding of *Pennsylvania v. Mimms* is that whenever a police officer stops a vehicle for a traffic violation, even of the most minor variety, it is reasonable for the officer to order the *driver* to alight from the vehicle before the officer proceeds to . . . take appropriate action.
>
> . . .
>
> The [*Mimms*] holding was very clear that the prerogative is automatic under such circumstances and that no individual or particularized suspicion that the *driver* might be armed is involved. . . . Once the lawfulness of the initial stop of the vehicle is established, nothing more need be shown on a case-by-case basis to justify the incremental intrusion of ordering the *driver* out of the vehicle.

Petition. at 7a-9a (emphasis added).

Judge Moylan also pointed out that "[i]n its opinion, [in *Mimms*] the Supreme Court made it clear that its focus was very narrow. . . . The only issue before the Supreme Court was the propriety of the [] act of ordering Mimms to step out of the vehicle after it had been stopped." *Id.* at 8a (citation omitted). Judge Moylan appropriately stated that *Mimms* "was completely silent on the police prerogative, if any, vis-a-vis a passenger." Petition at 9a. Judge Moylan stated further that once the existence of the passenger is noted by the *Mimms*

Court,[6] "the armed passenger dropped totally from sight and the opinion does not further allude to him [or other passengers] even obliquely." Petition at 9a. (citations omitted).

Judge Moylan deftly captured the essence of the Petitioner's argument: "The State does not simply argue that . . . *Mimms* should be extended to passengers; it argues that the *Mimms* principle has *already* been extended to passengers," Petition at 10a, by virtue of *dicta* in, inter alia, *Rakas* and *Long*. Judge Moylan's response to the State's argument is appropriate (even if colorfully outraged), as he justly criticizes the State's reliance on "the most *obiter* of *dicta*" which "should represent no more to us than the glib blandishments of a snake oil salesman, no matter who wrote them." Petition at 11a. Through this comment, Judge Moylan exposes, as groundless, the State's reliance on *Rakas* and *Long* as an obvious distortion of the *Mimms* holding.

In his analysis of *Long* and *Rakas*, Judge Moylan stated: "In *Michigan v. Long*, the Supreme Court was not remotely dealing with a *Pennsylvania v. Mimms* situation. [*Long*] was a case, rather, where there was undeniable articulable suspicion that an individual might be armed and dangerous. . . . The *Mimms* principle itself was not being considered." Petition at 11a-12a.

As to *Rakas*, Judge Moylan stated:

> The citation to *Rakas* is to a footnote in a concurring opinion. The issue for decision in *Rakas* had nothing to do with the police prerogative to order a driver or a passenger to alight from an automobile. It dealt exclusively with the standing of a 'mere passenger' to raise a Fourth Amendment challenge to the search of someone else's automobile.

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[6] Judge Moylan referred to the statement that "[t]he other occupant of the car was carrying a .32-caliber revolver." *Mimms*, 434 U.S. at 107.

Petition at 13a-14a. With regard to this Court's transformation of the word "driver" into the word "passenger," Judge Moylan stated: "The deceptively broad reference to 'passengers' was simply wrong. It should, more carefully, have been a more limited reference to 'drivers.' That distinction, however, was not remotely involved in the discussion and should not be given a significance that was never intended." Petition at 14a.

> Regarding this Court's word choices in *Rakas* and *Long*, Judge Moylan stated: [The writers did what] opinion writers sometimes do. On an immaterial issue and casually in passing, they characterized *Pennsylvania v. Mimms* as they remembered it, but they remembered it wrongly. They did not put down a pen in mid-sentence and run to the United States Reports for the obvious reason that the passing reference was not in any way the focus of consideration.

Petition at 15a.

C. Judge Moylan's Opinion in the Court Below Comports with Supreme Court Precedent.

As previously discussed, *Mimms* addressed only the "very narrow question of whether the order to get out of the car, issued [to the driver] after the *driver was lawfully detained*, was reasonable and thus permissible under the Fourth Amendment," *Mimms*, 434 U.S. at 109 (emphasis added), even when "the officer had no reason to suspect foul play from the particular driver at the time of the stop, there having been nothing unusual or suspicious about his behavior." *Id.* Accordingly, *Mimms* stands for the narrow proposition "that once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the *driver* to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures." *Id.* at 111 n.6 (emphasis added).

Clearly, Judge Moylan understood the narrow issue before the *Mimms* Court and the holding that flowed from it. He further understood how *Mimms* was distorted in the *dicta*

contained in both *Rakas* and *Long*. Judge Moylan respected the holding of *Mimms*. He also placed *Rakas* and *Long* into perspective with respect to *Mimms* and, therefore, with respect to the case at bar.

In addition, Judge Moylan stated: "Judge Bollinger [the suppression court judge] made no ruling that the circumstances in this case would not be sufficient, as a matter of constitutional law, to justify a sense of apprehension on the part of Trooper Hughes and appropriate preventive action by him." Petition at 32a. In so doing, Judge Moylan left undisturbed the trial court's findings of fact with respect to the presence, or lack thereof, of reasonable articulable suspicion on the part of the Trooper. This Court, similarly, should defer to the lower court's findings of fact.

In this Court's *dicta* in *Rakas* and *Long*, the Court misstated its narrow holding announced in *Mimms*. The State of Maryland has incorrectly attempted to take that impreciseness of language one step further, applying it to this case. The State of Maryland cannot fairly label this careless wording as "precedent," nor can it succeed in arguing that Judge Moylan must adhere to such impreciseness of language, particularly when it appears only in *dicta*. The only precedent that Judge Moylan was obligated to follow -- and did apply -- was the holding of *Mimms*. Respondent respectfully urges this Court to recognize that Judge Moylan neither distorted, nor disregarded, the clear distinctions between these three Supreme Court cases. Because Judge Moylan's decision was not contrary to precedent, but was consistent with precedent, this Court should defer to the trial court's finding of fact.

II. THE ISSUE PRESENTED IN THE PETITION HAS REMAINED LARGELY UNTOUCHED BY THE LOWER COURTS.

During the 19 years since this Court decided *Pennsylvania v. Mimms*, when considering all of the reported decisions within all of the state and federal courts, on only 61 occasions has a court had the opportunity to rule on the issue of whether the holding in *Mimms* should be extended to a passenger in a vehicle. This is an incredibly small amount of times that any court has addressed the issue of whether a police officer can remove a passenger from an automobile, without even reasonable suspicion, particularly in light of the multitude of cases that have come before courts involving the interaction of police officers and automobiles and/or the occupants of automobiles. The reason for such a low number is directly related to this Court's treatment and expansion of the exceptions to the Fourth Amendment's warrant requirement.

The great majority of cases involving the interaction between police officers and automobiles and their occupants are governed by sound legal principles. *See California v. Hodari D.*, 499 U.S. 621 (1991) (mere show of authority, without submission or physical contact, is not a "seizure" for Fourth Amendment purposes); *Illinois v. Rodriquez*, 497 U.S. 177 (1990) (police may search if consent is given by a person that the police officer reasonably believes has authority to give consent); *New York v. Harris*, 495 U.S. 14 (1990) (evidence obtained after an illegal search or seizure must be suppressed as a "fruit of the poisonous tree" if the taint has not been attenuated); *Michigan v. Long*, 463 U.S. 1032 (1983) (if there is reasonable suspicion that the individual is armed and dangerous, the police may conduct a protective sweep of any area in which a weapon may be contained); *New York v. Belton*, 453 U.S. 454 (1981) (police may contemporaneously search the entire interior of a vehicle, without a warrant, following a lawful arrest of its occupant); *Rakas v. Illinois*, 439 U.S. 128 (1978)

(only a person with a possessory interest has a reasonable expectation of privacy, such as to challenge the vehicle search); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam) (police may require the driver of a vehicle to exit the vehicle based solely on an underlying valid stop); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (officers may inventory a vehicle, pursuant to regulatory procedures, without a warrant); *Terry v. Ohio*, 392 U.S. 1 (1968) (police may conduct a pat down of the outside garment, i.e., conduct a stop and frisk, if they have reasonable, articulable suspicion as to the suspect); *Carroll v. United States*, 267 U.S. 132 (1925) (an officer may search an automobile without a warrant if probable cause exists to believe that the automobile contains evidence of a crime and there is no time to obtain warrant).

The District of Columbia has not yet decided whether *Mimms* should be extended to passangers in automobiles. A total of 27 of the 50 states have not yet decided the issue that Petitioner presents to this Court. A total of 91 of the 95 federal district courts have not yet decided this issue. A total of seven of the 11 federal circuit courts have not yet decided this issue. Thus, out of the possible 157 jurisdictions that could have addressed the issue presented by Petitioner, 126 have not found it necessary to decide whether this Court's decision in *Mimms* should be extended to passengers. The fact that during this 19-year period, 126 jurisdictions have not had the need to decide this issue is strong evidence that there is no need for this Court to decide the issue presented by Petitioner. The reason that so many jurisidictions have not needed to decide this issue is because almost all scenarios involving the interaction of the police with citizens and vehicles are controlled by other well-delineated case interpretations by this Court. Thus, this Court's Fourth Amendment jurisprudence has already

provided the means to ensure the safety of our police officers, while ensuring that the right to be free from unreasonable searches and seizures is protected.

Petitioners contend that "the lower federal and state court are sharply divided on its proper resolution". Petition at 10 (discussing application of the *Mimms* rule to passengers). Although at first glance this may appear accurate, a deeper analysis shows a different conclusion. Of the 31 federal and state jurisdictions deciding Petitioner's issue, 18 jurisdictions (14 states, two federal districts, and two federal circuits) have extended the *Mimms* holding to apply to passengers in a vehicle. *See Ruvalcalba v. City of Los Angeles*, 64 F.3d 1323 (9th Cir. 1995); *Canal Zone v. Bender*, 573 F.2d 1329 (5th Cir. 1978); *United States v. McCoy*, 824 F. Supp. 467 (D. Del. 1993); *United States v. Terry*, 718 F. Supp. 1181 (S.D. N.Y. 1989); *Doctor v. State*, 573 So. 2d 157 (Fla. App. 1991), *rev'd in part on other grounds*, 596 So. 2d 442 (Fla. 1992); *People v. Salvator*, 602 N.E.2d 953 (Ill. App. 1992), *appeal denied*, 610 N.E.2d 1273 (Ill. 1993); *Warr v. State*, 580 N.E. 2d 265 (Ind. App. 1991); *State v. Landry*, 588 So. 2d 345 (La. 1991); *People v. Martinez*, 466 N.W.2d 380 (Mich. 1991), *vacated on other grounds*, 483 N.W.2d 868 (Mich. 1992); *State v. Reynolds*, 775 S.W.2d 1 (Mo. 1988); *People v. Robinson*, 543 N.E.2d 773 (N.Y.), *cert denied*, 493 U.S. 966 (1989); *State v. Collins*, 248 S.E.2d 405 (N.C. 1978); *State v. Evans*, 618 N.E.2d 162 (Ohio 1993), *cert. denied*, 114 S. Ct. 1195 (1994); *Commonwealth v. Brown*, 654 A.2d 1096 (Pa.1995), *appeal denied*, 664 A.2d 972 (Pa. 1995); *State v. Soares*, 648 A.2d 804 (R.I. 1994); *Graham v. State* 893 S.W.2d 4 (Tex. App. 1994); *Bethea v. Commonwealth*, 419 S.E.2d 249 (Va. 1992), *aff'd on other grounds*, 429 S.E.2d (Va. 1993). Six states (including

Maryland) have found that extending *Mimms* to passangers is inappropriate. *See People v. Maxwell*, 254 Cal. Rptr. 124 (Cal. Ct. App. 1988); *State v. Becker*, 458 N.W.2d 604 (Iowa 1990); *State v. Wilson*, 106 Md. App. 24, 664 A.2d 1 (1995); *State v. Smith*, 637 A.2d 158 (N.J. 1994); *Johnson v. State*, 601 S.W.2d 326 (Tenn. Crim. App. 1980); *State v. Kim*, 711 P.2d 1291 (Haw. 1985). Thus, there is not a great discrepancy among the states and federal courts regarding this issue.

Of the six states rejecting an extension of *Mimms*, only three (Maryland, Iowa, and Tennessee) have expressly held that *Mimms* does not extend to passengers of a automobile. Those jurisdictions agree that this Court's prior decision in *Terry v. Ohio*, 392 U.S. 1 (1968), controls when determining the "reasonableness" of ordering a passanger from an automobile. Two of those six states (New Jersey and California) have expressly stated that, although a *per se* right to order a passenger to alight is not appropriate, a police officer "need point only to some fact or facts in the totality of the circumstances that would create in a police officer a *heightened awareness of danger* that would warrant an objectively reasonable officer in securing the scene in a more effective manner by ordering the passenger to alight from the car." *State v. Smith*, 637 A.2d 158, 167 (N.J. 1994) (emphasis added); *People v. Maxwell*, 254 Cal. Rptr. 124, 126 (Cal. Ct. App. 1988) (citing *People v. Padilla*, 183 Cal. Rptr. 97 (1982)) ("A legitimate concern for officer safety provides sufficient justification for asking a passenger to get of a car stopped for traffic violations."). Finally, of the six states holding that *Mimms* does not apply to passangers in an automobile, two have decided the issue on independent and adequate state grounds, thus preventing any review of those decisions by this

Court. *See State v. Kim*, 711 P.2d 1291, 1294 (Haw. 1985) ("Under Article I, section 7 of the Hawaii Constitution, a police officer must have at least a reasonable basis of specific articuable facts to believe a crime has been committed to order a driver out of a car after a traffic stop"); *State v. Smith*, 637 A.2d 158, 165 (N.J. 1994) ("Today we are deciding whether, and under what conditions, *Mimms* should be extended to passangers. We apply the balancing test required by the State and Federal Constitution."). Thus, the extent of a conflict among the jurisdictions is minimal, and, therefore, the extent of the need for this Court to address this issue, at this time, is not compelling.

Petitioner urges that this Court needs to extend *Mimms* for the purpose of ensuring the safety of police officers. Petition at 15-16. This Court, in its decision in *Mimms*, considered the issue of police officer safety during a routine traffic stop. "We think it too plain for argument that the stated proffered justification -- the safety of the officer -- is both legitimate and weighty." *Mimms*, 494 U.S. at 110. However, in *Mimms*, this Court balanced officer safety against competing Fourth Amendment rights, and held that a police officer was allowed to order a driver from an automobile, after stopping the driver for a traffic infraction, without some reasonable, articulable suspicion as to criminal activity. This line was drawn as to drivers only, notwithstanding the fact that a passanger was present in the automobile in *Mimms*.

Although officer safety is always a valid concern, Petitioner's request for a Writ of Certiorari should not be granted solely for this reason. The risk to an officer's safety is not, without more, heightened necessarily by the presence of a passenger in a car stopped in a routine traffic stop. In 1994, of the 76 officers feloniously killed, 11 officers were killed

during traffic pursuits or traffic stops. U.S. Department of Justice, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted* 11 (1994). An analysis of the Summaries of Felonious Incidents reveals that of those eleven officers killed, only one was killed in a situation similar to the one at hand, i.e., by a passenger during a routine traffic stop. *Id.* 43-60. Furthermore, the total number of officers reported killed by passengers during routine traffic stops, for the years 1984, 1987, 1988, 1989, 1990, 1991, and 1992, was three.[7] More officers are injured during traffic stops by approaching motorists than by attacks from suspects within vehicles. International Association of Chiefs of Police National Law Enforcement Policy Center, *Motor Vehicle Stops: Concepts and Issues Paper* 3 (1992). In fact, the IACP, in formulating its recommendations on the issue of whether to order occupants out of the vehicle or to require them to remain inside the vehicle, stated: "Unless the officer orders the violator out of his vehicle for the purpose of conducting a sobriety check, to frisk the vehicle for weapons or for any other reason, the violator should normally remain in his vehicle." *Id.* at 4.

The reasons for ordering an occupant out of a vehicle would be those already decided by this court, i.e., reasonable suspicion. Otherwise, the IACP recommends that the occupants remain in the vehicle. "Where more than one individual emerges from the subject vehicle, officers must exercise particular caution to ensure that the situation does not escalate or get out of control." *Id.* "In this or in any other instance during a vehicle stop, officers should

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[7]An additional seven officers were killed, whose assailants were unknown, and four officers were killed in combined assaults by the driver and passenger. U.S. Department of Justice, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted* 11 (1994).

remember that they can and should exercise their legal authority to order any or all individuals out of a vehicle if they feel their safety is threatened." *Id.* at 3. The recommendations in these guidelines instruct officers to initially control the situation by having the occupants remain in the vehicle, to evaluate each scenario independently, and to consider all the factors involved, and, based on the officer's comprehensive evaluation, determine whether or not to order an occupant out of the vehicle.

In sum, these guidelines instruct the officer to use a totality of the circumstances approach. Officers using this common sense approach should ordinarily have no need to order a passenger out of a vehicle. If, under the totality of the circumstances, the officer believes that safety is at issue, the officer will have a reasonable articulable suspicion on which to order a passenger to exit the vehicle. In light of the recommended police procedure and its rationale, designed to ensure officer safety, there is no need for this Court to create a rule extending the holding in *Mimms* to passengers.

The safety to the officer from vehicle traffic was also a major concern of this Court in its decision in *Mimms*. The hazard of accidental injury to an officer from passing traffic standing on the driver's side of the vehicle may also be appreciable in some situations. *Id.* at 111. However, the danger to officers is diminished greatly in the situation of an officer questioning or assisting a passenger in a vehicle. IACP National Law Enforcement Policy Center, *Motor Vehicle Stops*: *Model Policy* 1 (1991) (At the desired locations, the officer should signal the operator to stop at the *far right side* of the roadway or at the safest shoulder.) (emphasis added). Because most passengers are in the front passenger seat and most stops occur on the right side of the travel lane, the officer is protected from passing vehicles and the

ordering of the passenger out of the car for this reason is not justified.

III. THIS ISSUE IS NOT AN APPROPRIATE ISSUE FOR THIS COURT TO ADOPT A BRIGHT-LINE RULE.

With regard to the Fourth Amendment doctrine, "[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagarly feed, but they may be 'literally impossible of application by the officer in the field.'" *New York v. Belton* 453 U.S. 454, 458 (1981) (quoting Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 S. Ct. Rev. 124, 141). However, hard-and-fast rules, with precise boundaries, applicable to all situations of a given type, regardless of variations in the facts of particular cases, are not appropriate for every Fourth Amendment situation.

Acknowledging this fact, this Court has recognized both (1) the need to provide guidance to the police and lower courts through bright-line rules or standardized procedures, and (2) the necessity to maintain flexibility through a case-by-case determination of the reasonableness of particular police pratices. This Court has set forth strict rules or standarized procedures in some cases. *See e.g., New York v. Belton*, 453 U.S. 454 (1981); *Michigan v. Summers*, 452 U.S. 692 (1981); *Dunaway v. New York*, 442 U.S. 200 (1979); *Robinson v. United States*, 414 U.S. 218 (1973). In other cases, this Court has established a flexible reasonableness-balancing analysis. *See, e.g, Terry v. Ohio*, 392 U.S. 1 (1968).

Even Professor LaFave, whose support for bright-line rules was quoted by this Court in *New York v. Belton*, has recognized that bright-line rules are not appropriate for all Fourth

Amendment scenarios. Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing 'Bright Lines' and 'Good Faith'*, 43 U. Pitt. L. Rev. 307, 323 (1982). In particular, the issue before this Court, of whether *Pennsylvania v. Mimms* should be extended to passengers, is not an area of the law in which any bright line rule would safeguard both Fourth Amendment rights and the safety of police officers.

Therefore, in order to determine when a bright-line rule is appropriate, Professor LaFave established four questions that should be put before any such rule is adopted by a court: (1) Does it have clear and certain boundaries, so that it makes case-by-case evaluation and adjudication unnecessary? (2) Does it produce results approximating those that would be obtained if accurate case-by-case application of the underlying principle were practicable? (3) Is it responsive to a genuine need to forego case-by-case application of a principle because that approach has proved unworkable? (4) Is it not readily subject to manipulation and abuse? *Id.* at 325.

In the instant case, the answer to all of these questions is "no." The State urges that this Court establish a bright-line rule, applying the rule that permits police officers to order drivers of validly stopped automobiles out of their vehicles, under *Pennsylvania v. Mimms*, equally to all passengers, of all vehicles, under all circumstances. Such a rule, on first blush, appears to have clear and certain boundaries, making case-by-case evaluation and adjudication unnecessary. However, such a rule is not so clear or certain as it frst appears. Unlike the sole driver, there may be no passengers, one passenger, or multiple passengers ranging in number from zero to six in most vehicles, and even more in minivans and buses. Which passengers would police officers be allowed to order out of the vehicle? Only the front

passenger? Both the front and the backseat passengers? Only the backseat passengers? Everyone in the car? The first row of people in a bus? All of the passengers on a bus? Can the officer order all passengers out of a vehicle during the day, or only at night when the officer's ability to see activity inside the vehicle is hindered?

Therefore, a bright-line rule, allowing police officers to order all passengers out of all validly stopped automobile, does not effectuate the State's purpose of protecting police officers. A police officer could clearly place himself in greater danger by keeping watch over six individuals roaming around outside a vehicle than six individuals confined to the interior of a vehicle.

Furthermore, passengers vary, not only in number, but also in age, expectation of privacy, and intimacy with the driver of the vehicle. That fact would provoke additional questions by the adoption of a bright-line rule. For example, police intrusion would more clearly necessitate a case-by-case adjudication in situations in which officers order elderly passengers, posing no apparent threat of violence, out of the vehicle in the pouring down rain or late at night. Similar adjudication would be warranted in instances in which the passengers are children or infants.

Such intrusion upon a passenger's Fourth Amendment protection is more pronounced and unreasonably invasive than that of the driver. There is a great distinction between the driver of a validly stopped vehicle and the passenger within the vehicle. Unlike the driver, who is in control of the vehicle, and in some way violates the law, thereby invoking a valid stop, the passenger has no control over the vehicle and presumptively commits no traffic offense. "The passenger may not be issued a traffic ticket or citation, let alone be subjected to

custodial arrest." *State v. Wilson*, 106 Md. App. 24, 43, 664 A.2d 1, 10 (1995). "The passenger is not required to furnish identification or any other documentation." *Id.* "The passenger is presumptively free to abandon the driver to the clutches of the law and hail a cab." *Id.* Thus, under many circumstances, a police intrusion of the passengers' Fourth Amendment rights can hardly be considered "de minimus," and would require some individualized evaluation and adjudication guided by Fourth Amendment principles.

With regard to Professor LaFave's second and third inquiries, a bright-line rule in this situation would not produce results approximating those that would be obtained in an accurrate case-by-case analysis. The State argues for a bright-line rule. However, police officers, based on their assessment of each situation -- and not the courts -- are in the best position to determine when their safety is threatened. Once a police officer is, or has reason to feel, threatened, a passenger can be ordered out of the vehicle, regardless of whether a bright-line exists. The officer feeling threatened would have articulable individualized suspicion to order the passenger to exit the vehicle. This situational evaluation is performed every day by police officers and has worked efficiently, without all passengers, or even the majority of passengers, being ordered out of their vehicle. However, if the State's bright-line rule were adopted, a case-by-case analysis would no longer be required. Arguably, the number of passengers being ordered out of their vehicles would be drastically different. Consequently, the results of a case-by-case analysis and a bright-line rule would be markedly different. Moreover, new bright-line rules should not be drawn when the existing doctrine is not causing serious problems in day-to-day practice. Accordingly, there is no demonstrated need to forego the current case-by-case analysis already being applied.

Finally, and addressing Professor LaFave's fourth threshold question, a bright-line rule in this situation is subject to manipulation and abuse. As Justice Stevens pointed out in his dissent in *Pennslyvania v. Mimms*, "to eliminate any requirement that an officer be able to explain the reasons for his actions leaves police discretion utterly witout limits." *Mimms*, 434 *U.S.* at 122. "Some citizens will be subjected to this indignity while others--perhaps those with more expensive cars, or different bumper stickers, or different colored skin--may escape it entirely." *Id.* This unfettered discretion would apply to passengers as well.

In addition, bright-line Fourth Amendment rules may fail in their mission of simplifying the administration of justice for essentially two reasons. Albert W. Alschuler, *Bright Line Fever and The Fourth Amendment*, 45 U. Pitt. L. Rev. 227, 231 (1984). First, establishing a specific rule for every possible Fourth Amendment encounter between police officers and citizens will inevitably result in the creation of so many rules that no one, especially police officers in the field, will be able to remember or properly use such rules. *Id.* Second, due to the diversity of the types of encounters between citizens and police officers, bright-line rules are ineffective due to their rigidity. While a rigid rule may be easily applied, the injustice that results from applying it to nonconforming situations will outweigh the gain in efficiency. *Id.*; Terence C. Gill, Note, *Regulating the Police in Investigatory Stops: A Practical Alternative to Bright Line Rules*, 59 S. Cal. L. Rev. 183 (1985).

Because Fourth Amendment encounters between the police and the public are simply too numerous and too varied to be subject to standardized procedures that will always dictate the appropriate police response, attempts to draft bright-line rules have proved unsuccessful. Gerald G. Ashdown, *Good Faith, The Exclusionary Remedy, and Rule-Oriented Adjudication*

in the Criminal Process, 24 Wm. & Mary L. Rev. 335 (1983). Such rules provide some guidance, but are incapable of addressing, in advance, all of the factual situations that police may encounter. *Id.; see also* Alschuler, *supra* at 227.

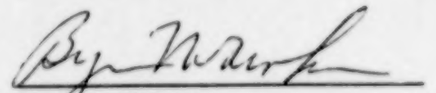
When the best rules that our powers can devise produce injustice often enough, we do well to abandon them even at the price of lawlessness. *Id.* When the appropriate blend of law and discretion cannot be determined 'in the large,' as in the instant case, the issue must be resolved 'in the specific,' by examining the facts and circumstances of a particular rule. Alschuler, *supra* at 227. *Mimms*, in conjunction with *Terry*, provides the balanced police descretion necessary to both ensure officer safety and to protect against Fourth Amendment violations. If the bright-line rule, as requested by the State, were to be adopted, on this issue, injustice would most often result. Countless individuals would needlessly have their Fourth Amendment protection violated every day. At some point, this degree of injustice has to outweigh the benefit of such a rule.

Thus, while it is extremely important that Fourth Amendment doctrine be expressed in terms understandable to the police, "the quest for clear rules must proceed with caution if reasonable and predictable results are in fact to be obtained." LaFave, *supra* at 333. "For as Justice Rehnquist has noted: 'Our entire profession is trained to attack 'bright lines' the way hounds attack foxes. Acceptance by the courts of arguments that one thing is the 'functional equivalent' of the other, for example, soon breaks down what might have been a bright line into a blurry impressionistic pattern.'" LaFave, *supra* at 333 (citing *Robbins v. California*, 101 S. Ct. 2841, 2854 (Rehnquist, J., (now C.J.), dissenting)).

CONCLUSION

For the foregoing reasons, Respondent, Jerry Lee Wilson, respectfully requests that the petition for writ of certiorari be denied.

Respectfully Submitted,



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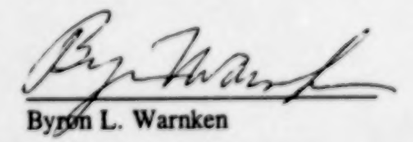
CERTIFICATE OF SERVICE

This is to certify that the (1) Motion for Leave to Proceed in Forma Pauperis, and (2) Brief in Opposition, in the case of State of Maryland v. Jerry Lee Wilson, No. 95-1268, October Term, 1995, in the Supreme Court of the United States, was mailed first class, postage prepaid, to Gary E. Bair, Esq., Assistant Attorney General, Office of the Attorney General, 200 Saint Paul Place, Baltimore, Maryland, 21202, on this 20th day of May, 1996.



Byron L. Warnken

ATTACHMENT A

JURISDICTION	MMMS PASSENGER EXTENDS (YES/NO)	# CASES	# REPORTED	# UNREPORTED
ALABAMA	N/A			
ALASKA	N/A			
ARIZONA	Probably	1	1	
ARKANSAS	N/A			
CALIFORNIA	NO	3	3	
COLORADO	Probably	1	1	
CONNECTICUT	Undecided	1	1	
DELAWARE	Fed - YES State - N/A	1	1	
D.C.	Undecided	3	3	
FLORIDA	YES	2	2	
GEORGIA	N/A			
HAWAII	NO			
IDAHO	N/A			
ILLINOIS	YES	1	1	
INDIANA	YES	1	1	
IOWA	NO			
KANSAS	Fed - Probably State - Undec.	2	2	
KENTUCKY	N/A			
LOUISIANA	YES	1	1	
MAINE	N/A			
MARYLAND	NO	1	1	
MASSACHUSETTS	Maybe	5	5	
MICHIGAN	YES	1	1	
MINNESOTA	Probably	2	2	
MISSISSIPPI	N/A			
MISSOURI	YES	2	2	

JURISDICTION	MMMS PASSENGER EXTENDS (YES/NO)	# CASES	# REPORTED	# UNREPORTED
MONTANA	N/A			
NEBRASKA	N/A			
NEVADA	N/A			
NEW HAMPSHIRE	N/A			
NEW JERSEY	NO	3	3	
NEW MEXICO	N/A			
NEW YORK	Fed - YES State - YES	4	4	
NORTH CAROLINA	YES	1	1	
NORTH DAKOTA	Probably	1	1	
OHIO	YES	10	5	5
OKLAHOMA	N/A			
OREGON	N/A			
PENNSYLVANIA	YES	3	3	
RHODE ISLAND	YES	2	2	
SOUTH CAROLINA	N/A			
SOUTH DAKOTA	N/A			
TENNESSEE	NO	1	1	
TEXAS	YES	3	3	
UTAH	Undecided	2	2	
VERMONT	N/A			
VIRGINIA	YES	4	4	
WASHINGTON	Undecided			
WEST VIRGINIA	N/A			
WISCONSIN	YES	1	0	1
WYOMING	N/A			

JURISDICTION	MIMMS PASSENGER EXTENDS (YES/NO)	# CASES	# REPORTED	# UNREPORTED
TOTAL STATES	**YES 14 NO 6 PROB. 4 MAYBE 1 UNDEC. 5 N/A 21**	60	54	6
TOTAL FEDERAL DIST. COURTS				
TOTALS	**YES 16 NO 6 PROB. 5 MAYBE 1 UNDEC. 5 N/A**	63	57	6
FEDERAL CIRCUIT COURTS				
1st	N/A			
2nd	N/A			
3rd	N/A			
4th	Maybe	2	1	1
5th	YES	1	1	
6th	Undecided			
7th	Probably	1	1	
8th	N/A			
9th	YES	1	1	
10th	Undecided			
11th	N/A			
Virgin Islands	YES	1	0	1
TOTAL FEDERAL CIRCUIT COURTS	**YES 3 NO 0 PROB. 1 MAYBE 1 UNDEC. 2 N/A 6**	6	4	2

JURISDICTION	MIMMS PASSENGER EXTENDS (YES/NO)	# CASES	# REPORTED	# UNREPORTED
TOTAL STATE, FEDERAL DISTRICT AND FEDERAL CIRCUIT COURTS	**YES 19 NO 6 PROB. 6 MAYBE 2 UNDEC. 7 N/A 21**	69	61	8

(2)

Supreme Court, U.S.
FILED
MAR 11 1996
CLERK

CASE NO. 95-1268

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1995

STATE OF MARYLAND,
Petitioner,
vs.
JERRY LEE WILSON
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE MARYLAND COURT OF SPECIAL APPEALS

BRIEF OF AMICI CURIAE STATES OF OHIO, ALABAMA, ARIZONA, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, IOWA, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEVADA, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, PUERTO RICO, SOUTH DAKOTA, UTAH, VERMONT AND VIRGIN ISLANDS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHEN A POLICE OFFICER MAKES A ROUTINE TRAFFIC STOP, DOES THE AUTOMATIC RIGHT TO ORDER THE DRIVER TO EXIT THE VEHICLE AS SET FORTH IN *PENNSYLVANIA V. MIMMS*, 434 U.S. 106 (1977), ALSO EXTEND TO PASSENGERS IN THE STOPPED VEHICLE.

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STATEMENT OF AMICUS INTEREST

This case presents an exceedingly important federal question, one that has sharply divided the lower courts since 1977. In *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), the Court held that police officers may order the driver of a vehicle to exit the car during a traffic stop. The question presented here, which was not directly resolved in *Mimms* and which has divided the lower courts ever since, is whether the officer's authority to require the driver to exit the car extends to passengers in the vehicle.

In its decision below, the Maryland Court of Appeals held that *Mimms* did not extend to this setting; it instead forced the officer to establish "heightened caution" before requiring passengers to exit the car. In doing so, the court ignored the teachings of this Court since *Mimms*, devalued the State's interest in protecting its law enforcement officers, overstated the liberty interests of passengers in a properly-stopped vehicle, and sharpened a lower court conflict on this issue.

Like Maryland, the Amici States are entrusted with the enforcement of highway safety violations. In meeting this responsibility, Amici States are broadly concerned with judicial decisions that make the already-dangerous job of law enforcement still more dangerous, particularly with respect to the often perilous context of traffic stops.[1] Accordingly, because this case involves a critical federal question to the

[1] Ohio State Highway Patrol records indicate that in 1995 alone, there were 51 officer assaults and 308 incidents of resisting arrest. With few exceptions, each of these cases evolved from trooper contact with criminal activity through traffic-related encounters.

States and because it concerns an issue on which lower state and federal courts are deeply divided, the 27 Amici States join together in asking the Court to review and reverse the Maryland Court of Special Appeals' decision.

STATEMENT OF THE CASE

Amici curiae adopt the Petitioner's statement of the case.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO ESTABLISH THAT, JUST AS LAW ENFORCEMENT OFFICERS MAY ORDER DRIVERS OF LAWFULLY STOPPED VEHICLES TO EXIT THE VEHICLE UNDER *PENNSYLVANIA v. MIMMS*, 434 U.S. 106 (1977), SO TOO MAY THEY ORDER PASSENGERS OF THOSE VEHICLES TO DO THE SAME.

A. Introduction.

The key problem with the lower court's decision is that it undervalues the empirically-established dangers that police officers face from the passengers of properly-stopped vehicles and overvalues the extent of the liberty intrusion that exit orders impose on the occupants of those vehicles. The decision also is directly at odds with decisions from the overwhelming majority of state and federal courts, and ignores the underlying teachings of *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) and its progeny. The decision should be reviewed -- and reversed.

B. The State's Interest In Protecting Law Enforcement Officers From Potentially Dangerous Vehicle Occupants Outweighs The *De Minimus* Intrusion On The Personal Liberty Of Passengers Who Are Ordered To Exit A Lawfully Stopped Vehicle.

Pennsylvania v. Mimms, 434 U.S. 106 (1977) held that a police officer may order the driver of a vehicle to exit the car during a legitimate traffic stop. In balancing the officer's legitimate safety concerns against the driver's liberty interests, the Court made two observations. On the one hand:

> Establishing a face-to-face confrontation diminishes the possibility, otherwise substantial, that the driver can make unobserved movements; this, in turn, reduces the likelihood that the officer will be the victim of an assault.
>
> We think it too plain for argument that the State's proffered justification-the safety of the officer-is both legitimate and weighty.

Id. at 111. On the other hand, the intrusion on the driver's liberty "hardly rises to the level of a 'petty indignity.'" *Id.*

The balance struck in *Mimms* thus turned largely on the dangers to law enforcement officers presented by such encounters. Those dangers are well documented. As this Court has repeatedly recognized, traffic stops result in a high percentage of officer fatalities. *See, e.g., Adams v. Williams*, 407 U.S. 143, 148 n.3 (1972)(study showed that approximately 30 per cent of police shootings occurred when a police officer approached an automobile); *accord, Mimms*,

434 U.S. at 110; Bristow, *Police Officer Shootings--A Tactical Evaluation*, 54 J.Crim.L.C. & P.S. 93 (1963). It thus is beyond dispute "that a significant percentage of murders of police officers occurs when the officers are making traffic stops." *United States v. Robinson*, 414 U.S. 218, 234 n.5 (1973).

Regrettably, in the two decades since *Mimms* was decided, the number of assaults upon police officers has continued to grow. FBI statistics show that between 1988 and 1993, the number of those assaults rose by 13%, and in 1993 the number of police officers murdered in the line of duty jumped by over 11%. Federal Bureau of Investigation, *Uniform Crime Reports: Law Enforcement Killed and Assaulted* (1993). Notably, one in seven of these murders occurred in connection with a traffic stop.[2] The decision below simply failed to account for these strong state interests, interests that parallel many of this Court's same concerns in *Mimms*.

At bottom, the Maryland Court of Special Appeals made three mistakes. First, the court failed to perceive the increased danger of stopping a vehicle containing multiple occupants, as opposed to a vehicle containing merely a driver. Indeed, in the lower court's view, the need to protect an officer from a passenger was "just as great" as the need to protect him from a driver. The essential fact of the matter is this: an officer who stops a crowded car faces far

---

[2] Even reported decisions confirm the dangers that law enforcement personnel face from drivers *and* passengers during traffic stops. *See, e.g., Hester v. State*, 544 S.W.2d 129 (1976) (driver and passenger opened fire on police officers during a routine traffic stop, killing two officers).

more peril than one who stops a car with only a driver. Society's heightened need to provide protection to the officer in this distinct setting should correspond to the increased risk. The lower court's contrary conclusion was mistaken.

Second, the lower court exaggerated the liberty interest of the passengers. Contrary to the lower court's conclusion, the passenger of a vehicle lawfully stopped by a police officer is faced with essentially the same personal liberty intrusion as the driver. Both individuals are temporarily prohibited from continuing to their immediate destination. And both individuals face an equally *de minimus* liberty intrusion by being ordered to exit the vehicle. As with the driver, the passenger of a lawfully stopped vehicle simply cannot proceed. The only real question is whether the passenger is going to spend the stop sitting in the car or standing alongside it. *Mimms, 434 U.S.* at 111. Of course, even if the passenger does not wish to wait out the stop, the passenger still has to exit the vehicle in order to leave.

Thus, what was true in *Mimms* is just as true here:

> not only is the insistence of the police on the latter choice not a "serious intrusion upon the sanctity of the person," but it hardly rises to the level of a "'petty indignity.'"

Id. In the end, the decision below puts the officer in a no-win situation: the officer either can order the driver to exit the vehicle (which prevents the officer from keeping an eye on the passengers) or can allow the driver and passengers to stay in the car (which prevents the officer from realizing the benefits of *Mimms*).

Third, the "heightened caution" standard that the court erected is neither workable nor sufficient to protect the

officer's safety. The new standard is not workable because there is no principled way to assure that it will have predictable meaning to officers, judges and citizens alike. The standard does not protect officers because by the time officers perceive *additional* danger signals (beyond those normally attendant to traffic stops), it may be too late to protect themselves.

C. This Court Should Resolve A Deep Conflict Among the Lower Courts On This Important Federal Question.

Whether one agrees or not with the Amici States' assessment of the Maryland Court of Special Appeals' decision, it is beyond cavil that this case raises an important issue of federal law that has deeply divided the lower courts. In addition to Maryland, three other states have held that the *Mimms* rule does not extend to passengers. Much like Maryland, for example, New Jersey and Iowa have held that a police officer must have some sense of "heightened caution" before requiring the passenger of a lawfully stopped vehicle to exit the car. *See State v. Becker,* 458 N.W.2d 604 (Iowa 1990); *State v. Smith,* 637 A.2d 158 (N.J. 1994). On slightly different grounds, in *People v. Maxwell,* 254 Cal. Rptr. 124 (Cal. Ct. App. 1988), the court held that police officers could not order a passenger to exit a car absent some suspicion concerning the passenger. In doing so, the court found that the officer could only order a passenger to exit a lawfully stopped vehicle if there was an "inchoate and unparticularized suspicion that it would be better for the officer's safety[.]" *Id. at 127 (citing People v. Beal,* 118 Cal. Rptr. 272 (Cal. Ct. App. 1974)).

The vast majority of states, however, have reached a different conclusion, holding that *Mimms* permits police officers to require drivers *and* passengers to exit a properly

stopped vehicle. Rhode Island, for example, has relied upon post-*Mimms* decisions of this Court, see *Rakas v. Illinois*, 439 U.S. 128 (1978) and *Michigan v. Long*, 463 U.S. 1032 (1983), to extend *Mimms* to all occupants of vehicles stopped for valid reasons. *See State v. Soares*, 648 A.2d 804, 806 (R.I. 1994). At least seven other state courts have done the same. *See Doctor v. State*, 573 So.2d 157 (Fla. 1991), *rev'd in part on other grounds*, 596 So.2d 442 (Fla. 1992); *State v. Landry*, 588 So. 2d 345 (La. 1991); *People v. Martinez*, 466 N.W.2d 380 (Mich. Ct. App. 1991), *vacated on other grounds*, 483 N.W.2d 868 (Mich. 1992); *State v. Ferrise*, 269 N.W. 2d 888 (Minn. 1978); *People v. Robinson*, 543 N.E.2d 733 (N.Y.), *cert. denied*, 493 U.S. 966 (1989); *State v. Gilberts*, 497 N.W.2d 93 (N.D. 1993); *Commonwealth v. Brown*, 654 A.2d 1096 (Pa.), *appeal denied*, 664 A.2d 972 (Pa. 1995). *See also*, *State v. Webster*, 824 P.2d 768 (Ariz. 1991); *People v. Melgosa*, 753 P.2d 221 (Colo. 1988); *People v. Salvator*, 602 N.E.2d 953 (Ill. App. Ct. 1992), *appeal denied*, 610 N.E.2d 1273 (Ill. 1993); *Warr v. State*, 580 N.E.2d 265 (Ind. Ct. App. 1991); *State v. Williams*, 641 N.E.2d 239 (Ohio Ct. App.), *dismissed and mot. overruled*, 639 N.E.2d 114 (Ohio 1994). In addition, one federal circuit court, *see Ruvalcaba v. City of Los Angeles*, 64 F.3d 1323 (9th Cir. 1995), and one district court have extended *Mimms* to passengers, *see United States v. McCoy*, 824 F.Supp. 467 (D. Del. 1993).

In short, there is a significant -- and now deepening -- split among the state and federal courts on this issue. The Court should resolve the conflict.

CONCLUSION

The 27 Amici States respectfully request the Court to grant certiorari in this case.

Respectfully Submitted,

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Supreme Court, U.S.
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(4)

No. 95-1268

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF MARYLAND,
Petitioner,

v.

JERRY LEE WILSON,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 9, 1996
CERTIORARI GRANTED JUNE 17, 1996

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Chronological List of Relevant Docket Entries ... JA-1

Motion to Suppress Evidence (R. 36) JA-3

Transcript of Proceedings of November 23, 1994 (Hearing on motion to suppress) JA-5

The following opinions have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Writ of Certiorari:

Reported opinion of the Court of Special Appeals of Maryland, *State of Maryland v. Jerry L. Wilson*, 106 Md. App. 24, 664 A.2d 1 (1995) . . . App. 1a-32a

Unreported ruling of the Circuit Court for Baltimore County, Maryland, filed January 10, 1995, *State of Maryland v. Jerry L. Wilson*, Case No. 94 CR 02601 . . . . . App. 33a-36a

Reported order of the Court of Appeals of Maryland, filed November 22, 1995, *State of Maryland v. Jerry Wilson*, 340 Md. 502, 667 A.2d 342 (1995) . . . . . App. 37a

Unreported order of the Court of Special Appeals affirming the ruling of the Circuit Court for Baltimore County . . . App. 38a

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

July 5, 1994 — Eight-count indictment filed, charging conspiracy to violate controlled dangerous substance laws (four counts), importation of cocaine (one count), possession with intent to distribute cocaine (two counts), and possession of cocaine (one count).

July 14, 1994 — Defendant's motions pursuant to Md. Rule 4-252, including motion to suppress, filed.

November 23, 1994 — Defendant's motion to suppress heard and held sub curia.

January 10, 1995 — Opinion and order granting defendant's motion to suppress.

January 19, 1995 — State of Maryland's notice of appeal filed.

July 17, 1995 — Per curiam Order and mandate of the Court of Special Appeals of Maryland affirming order granting motion to suppress.

July 25, 1995 — Order of Circuit Court Administrative Judge staying proceedings pending disposition of case in Court of Appeals of Maryland.

August 1, 1995 — State of Maryland's petition for writ of certiorari filed in Court of Appeals of Maryland.

August 30, 1995 — Reported Opinion of Court of Special

Appeals of Maryland affirming order granting motion to suppress.

September 6, 1995 — Supplement to petition for writ of certiorari filed in Court of Appeals of Maryland.

November 22, 1995 — Order of the Court of Appeals of Maryland denying the petition for writ of certiorari.

December 8, 1995 — Order of Circuit Court Administrative Judge (dated December 5, 1995) staying proceedings pending disposition of case in United States Supreme Court.

STATE OF MARYLAND	*	IN THE CIRCUIT COURT
VS	*	FOR BALTIMORE COUNTY
JERRY LEE WILSON	*	CASE NO. 94 CR 2601

* * * * * * * * * * * *

MOTIONS PURSUANT TO
MARYLAND RULE 4-252

Defendant, by his/her attorney, pursuant to Maryland Rule 4-252, respectfully represents unto this Honorable Court:

1. That any identification of the defendant was or will be tainted as a result of impermissibly suggestive identification procedures by police authorities and/or was or will be the result of an illegal arrest or search.
2. That evidence was obtained as the result of an illegal search and seizure, arrest, and/or interception of communications.
3. That any statement/confessions taken from the defendant were involuntary and/or elicited during custodial interrogation without observance of procedural requirements of law.
4. That the defendant will be prejudiced by the joinder of his trial with that of any co-defendants and the joinder of charges arising from separate incidents.
5. That the indictment/information is defective.
6. That this prosecution is barred because of statute of limitations, immunity, and/or double jeopardy.

WHEREFORE, the defendant prays the following relief:

a) Dismissal of the indictment/information;

b) Suppression of any in-court identification and/or illegally seized evidence and/or any statements/confessions;

c) Severance of indictments/informations and/or severance of his/her trial from that of any co-defendants;

d) A hearing on the motion to dismiss the indictment/information, suppression of any in-court identification and/or illegally seized evidence and/or any statements/confessions, and severance of indictments/informations and/or severance of his/her trial from that of any co-defendant's;

e) And any further relief available by law.

Further, the Defendant moves this Honorable Court to grant him/her a speedy trial in the above-captioned matter.

/s/

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Citations of Authorities:
Chapman v. California, 386 US 18 (1967) Coleman v. State, 8 Md. App. 65 (1969), Mapp v. Ohio, 367 US 18 (1961), Hillard v. State, 286 Md. 145 (1979), Erman v. State, 49 Md. App. 605 (1981), McKnight v. State, 280 Md. 604 (1977), Ayre v. State, 291 Md. 155 (1981), Benton v. Maryland, 295 Us 784 (1979), McMorris v. State, 277 Md. 62 (1976).

[1]

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY, MARYLAND

Case No. 94 CR 2601

STATE OF MARYLAND

vs.

JERRY L. WILSON,

Defendant

OFFICIAL TRANSCRIPT OF PROCEEDINGS

Towson, Maryland
November 23, 1994

BEFORE:

THE HONORABLE THOMAS J. BOLLINGER, JUDGE,

APPEARANCES:

ON BEHALF OF THE STATE:

Dean Stocksdale, Esquire

ON BEHALF OF THE DEFENDANT:

G. Warren Mix, Esquire
John C. Calhoun, Esquire
James Farmer, Esquire

Reported by:

Diana Kukk, CSR

[2] PROCEEDINGS

MR. STOCKSDALE: Dean Stocksdale, Assistant State's Attorney for Baltimore County. I will be calling the case of State of Maryland versus Terrence McNichol, 94 CR 2602; and State of Maryland versus Jerry Wilson, 94 CR 2601. Judge, I apologize, we probably should have litigated the motions prior to trial date, but I understand there is one motion they want to pursue, a motion to suppress the evidence in this case. So far I think that is why we're here.

MR. MIX: Correct, Your Honor. G. Warren Mix, representing defendant, Jerry Wilson, along with co-counsel, Mr. Farmer.

MR. CALHOUN: John Calhoun for Mr. McNichol who is present.

THE COURT: Call your first witness.

MR. MIX: Motion to sequester all witnesses.

THE COURT: All who are going to testify in this case kindly step outside, remain outside until you are called to testify. Please do not discuss your testimony with anyone.

MR. STOCKSDALE: At this time, State calls Trooper David Hughes to the stand.

[3] WHEREUPON:

TROOPER DAVID HUGHES,

a witness herein, having been first duly sworn according to law, was examined and testified as follows:

THE CLERK: Please be seated. For the record would you state your name and current duty assignment.

THE WITNESS: Trooper David Hughes, currently assigned to John F. Kennedy Highway Barrack.

DIRECT EXAMINATION

BY MR. STOCKSDALE:

Q. How long have you been employed with the Maryland State Police?

A. Approximately 13 months.

Q. Calling your attention to June 8, 1994, at 7:30 p.m., did you have occasion to be employed with the Maryland State Police and on duty that evening?

A. Yes, I did.

Q. What were you doing at approximately 7:30 p.m., sir?

A. I was at a standstill, sir, at the crossover on I-95 facing southbound traffic, at that time.

[4] Q. Is that location that you just told Judge Bollinger in Baltimore County?

A. Yes, sir, it is.

Q. Did you make any unusual observations while you were at -- you were in a standstill position on southbound I-95?

A. That's correct. At that time I observed -- it was a white 1994 Nissan Maxima, it was in lane number one, at that time, which would be the far left. It appeared to be exceeding the posted speed limit, it went by at a high rate of speed. At that time I pulled out and I also observed on the vehicle there was no front tag, nor was there a back tag either. It was a brand-new car. And I then pulled out and the vehicle, at that time, I pulled out my vehicle, it slowly, causally [sic] went over to the far right lane, and I then went in behind the vehicle. I was directly behind the vehicle. At that time I initiated a pace, 64 miles an hour. There was no tag on the front or the back except on the back it was a paper tag kind of hanging half off, half on that said Enterprise Rent-A-Car.

Q. When you pulled out, how long did you follow the vehicle prior to it making movement from the far left lane; far left lane, is that the fast [5] lane?

A. Fast lane, lane one.

Q. To the far right. How long were you following the car until it did that?

A. Right away, immediately, as soon as I pulled out, as soon as I pulled out in lane one, the far left, got behind the vehicle, the vehicle causally [sic] went over, put the blinker on, went over to lane two then lane three, I then followed.

Q. What was the traffic like at that particular period of time?

A. It was -- traffic was light.

Q. When you were following the vehicle, how far were you behind the car, the Nissan Maxima?

A. Approximately five, six car lengths.

Q. At what speed were you pacing the vehicle in the slow lane?

A. 64 miles an hour in a 55 zone.

Q. Posted 55 zone?

A. Yes, sir.

Q. How far did you conduct a pace of the vehicle, the Nissan Maxima for 64 in a 55 zone?

A. Approximately one mile.

Q. Did there come a time when you took some action after initiating that pace?

[6] A. Yes, I activated my emergency equipment; upon initiating the pace, the vehicle eventually stopped at the 60.6 mile marker which would be Baltimore City, Maryland. So I continued an extra mile and a half before actually stopping with my light and siren on, at that time.

Q. So for a mile and a half you had your light and siren on?

A. That's correct, approximately.

Q. The vehicle kept driving?

A. Yes, sir.

Q. It was eventually stopped in Baltimore City?

A. Correct.

Q. Could you see the occupants inside the vehicle while you were conducting your pace of the vehicle?

A. Yes, I did, it was three occupants in the vehicle, but, however, the right-front passenger and the back-seat passenger I saw constant movement, at that time, I had my emergency equipment on, I saw the back seat passenger bend, turn several times, I would see the top of his head then I wouldn't see it. Same with the right front seat passenger. More so with the back seat passenger. I would see a head [7] over top of the seat, I would see him come down and go up, the back seat passenger; also the right-front seat passenger turn back and looking at me several times.

Q. How many times would you say the right front passenger that you saw his head duck below the seat level?

A. Four to five times.

Q. Was it daylight or nighttime during your pace of the Nissan Maxima?

A. It was daylight.

Q. Was anything obstructing your vision of the Nisson [sic] Maxima and its occupants while you were conducting the pace?

A. No, sir.

Q. With respect to where the vehicle eventually stopped, in what part of the roadway did it stop?

A. The far right, on the shoulder.

Q. Where did you park your car in relationship to the vehicle, the Nisson [sic] Maxima?

A. Directly behind it, at a ten degree angle.

Q. As soon as you stopped your car could you please describe for Judge Bollinger exactly what took place at that point?

[8] A. Okay. Your line of questioning do you mean making contact with?

Q. Yes, if you would explain what happened after you stopped the car.

A. Upon the traffic stop I still saw a lot of movement in the vehicle. I was a little bit hesitant to go all the way up to the vehicle. At that time I exited my vehicle, stood with my door open, facing the occupants in the vehicle, I asked the driver to step back to me, he was already out of the car coming back to me, so I had opened my door and kind of met him half-way at that time. The driver was Mr. McNichol; I spoke with him, told him why I had stopped him and asked for his driver's license and registration. He did have his driver's license, however, he didn't have the registration, it was a rental car.

Q. Go ahead.

A. He just advised that the papers were back in -- the rental papers were in the back in the vehicle, he did not have them on him at that time.

Q. Let me stop you there so we can discuss some time period. Where, exactly, did you meet Mr. McNichol, you identified him as the driver, where did you meet him in reference to where both of the [9] cars were?

A. He was, Mr. McNichol was to the back of his, which would be the front of my vehicle, is where I met him.

Q. How soon after the stop was initiated did Mr. McNichol get out of his car?

A. Immediately, right upon the stop.

Q. Did you request him to get out of the car?

A. No, I did not. When I saw the door opening then I opened my door, of course, because I didn't know, at that time, what was going to happen.

Q. Sure.

A. Then he started to come back to me and I just -- I kind of met him half-way. I went around the side of my door, we met at the front of my patrol car, at the rear of his vehicle.

Q. At that point how long did you engage Mr. McNichol in a conversation?

A. A minimum, at the most, 30 seconds to a minute.

Q. You indicated you asked him for his license.

A. License, registration of the vehicle.

Q. He showed you the license?

A. That's correct.

[10] Q. And said there was a rental agreement in the back?

A. Yes, sir.

Q. Or in the back of his car. What did you request of him, at that point, with respect to any registration or rental agreement or did you?

A. I did, at that time, I asked for the registration, however, he stated that it was back in the vehicle; and, you know, I asked him a couple more questions.

Q. What did you ask him, if you can remember?

A. Well, first of all, I told him why I stopped him, asked for his license and registration, he displayed the license, no registration, said it was back in the vehicle. I asked him where he was coming from, where he was going to. I asked him about the vehicle, the tag on the vehicle, I told him that, you know, about the paper tag, it was hanging off, that I was concerned with that, also with the speed, as well. Then I explained to him he could go back in the vehicle and retrieve the registration for me, at that time.

Q. Could you describe his demeanor during the period of time you engaged him in this conversation about license, registration and his route of travel, [11] destination?

A. Upon asking Mr. McNichol questions, I asked him where he was coming from, where he was going to, he was extremely nervous. Upon handing me the license he was trembling, his hand was shaking a little bit and he would answer, he would answer a question with a question. I said where are you coming from? Where am I coming from? You know, then he was coming from Connecticut.

Same line of questioning; where are you going to and he said where am I going to? Almost like he had to think about what, you know, where he was coming from and going to. And he seemed unusually nervous to me.

Q. Okay, at that point, what did Mr. McNichol next do?

A. At that point he went back to his vehicle, had a seat in the driver's seat.

Q. Where did he go?

A. Went back down, sat down in the driver's seat.

Q. What did you do, at that point?

A. At that time I then mentioned for the right front passenger, Mr. Wilson, to exit the vehicle, also step back with me.

Q. First of all, do you see Mr. McNichol in [12] the courtroom today?

A. Yes.

Q. Where is he?

A. Right here (indicating).

Q. For the record, identifying the defendant. Do you see Mr. Wilson?

A. Yes.

Q. Where is Mr. Wilson?

A. Right there (indicating).

Q. For the record, identifying Mr. Wilson, seated next to Mr. Farmer.

What did you do with respect to Mr. Wilson, at that point?

MR. MIX: Objection.

THE COURT: Basis?

MR. MIX: Judge, it's basically the whole purpose, at this stage, in reference to the motion to suppress, there is absolutely nothing in this officer's testimony, I may need to go into or under as to why he needs, at this point, to ask anybody else to get out of the car. The man's a passenger. He talked to the driver, he is satisfied with what the driver's given to him.

MR. STOCKSDALE: Judge, if you would like me to address it, I would. I thought this was going [13] to be what we would eventually argue about.

THE COURT: Why doesn't somebody tell me what we're trying to suppress here.

MR. STOCKSDALE: Drugs.

THE COURT: How were they found; what is the basis for the obtaining of the drugs, consent search?

MR. STOCKSDALE: Actually, what happens is after Mr. Wilson is asked to get out of the car he takes one step and falling from his left -- right pants leg, I am not sure which one it was, is 76.4 grams of cocaine, base crack cocaine. At that point the officer, it would be argued, recognized through his training, knowledge and experience that that is, in fact, crack. He is a passenger, he is placed under arrest. The other occupants of the car are passengers that were eventually placed under arrest. Found on the rear seat passenger who, I believe, was a juvenile, I believe he is being tried as an adult, was other paraphernalia and CDS and Mr. McNichol there was not anything found on him.

THE COURT: All right, that all goes after. The crux of the problem is did the request to get Mr. Wilson out of the passenger seat pass Constitutional muster, if it does, everything else [14] falls in line; if it doesn't, everything goes out.

MR. STOCKSDALE: That's correct. Are you asking me, at this point, to make my argument?

THE COURT: At this point, his objection is sustained, we're at that point you're cross-examining him, unless you have anything else up to that point.

MR. STOCKSDALE: I was going to get to the point where he asked him to get out of his car.

THE COURT: He said that.

MR. STOCKSDALE: What happens as soon as he took a step out of his car --

THE COURT: That is the way I see the motion. Do you agree, Mr. Mix?

MR. MIX: Yes, Your Honor.

MR. CALHOUN: I join the objection, Your Honor.

THE COURT: You join the objection. Well, I sustained it.

MR. STOCKSDALE: So I guess now, at this point, I am offering him for cross-examination because I'm prepared to argue.

THE COURT: I got your point.

MR. STOCKSDALE: Right, okay.

CROSS-EXAMINATION

[15] BY MR. MIX:

Q. Trooper Hughes, approximately, this was 7:30 p.m. on June 8?

A. Yes, sir.

Q. When you pursued this vehicle you said you had an opportunity to observe that the rear paper tag had Enterprise Rent-A-Car on it, correct?

A. That's correct.

Q. And did you file a police report on this matter, Trooper Hughes, which would be -- looks like complaint number Z 6211303, did you file that?

A. Yes, I did.

Q. And I guess it's on page three you talked about being on routine patrol when you first observed this car you believed to be operating at a high rate of speed in lane one, is that correct?

A. Yes, sir.

Q. You got behind it, paced 64 in a 55; is that not correct?

A. Yes, it is.

THE COURT: Mr. Mix, Mr. Stocksdale, I see Detective Taylor here, are you going to call him?

MR. STOCKSDALE: During my case in chief, not during the motion.

THE COURT: All right.

[16] MR. CALHOUN: Your Honor, I move to sequester him.

THE COURT: He is not going to call him why do you have to sequester him?

MR. STOCKSDALE: The other point, judge, is that I would be asking him to be qualified as an expert at the trial. I think, even at this stage, he would be permitted to sit in and listen to the testimony. That would be my other argument, that Detective Taylor should be able to remain in the courtroom.

THE COURT: Wait a minute. Out of an abundance of caution I am going to, for purposes of the motion, ask Detective Taylor to step out. There is a motion to sequester, we'll be careful.

All right, now, Detective Taylor is out of the courtroom. Are you satisfied, Mr. Calhoun?

MR. CALHOUN: Satisfied.

THE COURT: All right.

BY MR. MIX:

Q. How long was the pace, Trooper?

A. Approximately one mile, sir.

Q. One mile. Is there anything unusual on that highway of a speed of 64 in a 55?

A. 64 in a 55 is probably usual speed, [17] however, it's unusual to see no tags on a brand new vehicle like that, okay.

Q. You said there was a paper tag, Enterprise Rent-A-Car in the back?

A. Correct, hanging half-way on.

Q. I am asking you about the speed. Was anything unusual on that highway, at that hour, June 8 at 7:30 for a vehicle to be travelling 64 in a 55, from your experience, which at that time, was about 8 months on the police force; is there anything unusual about that speed?

A. Sir, what is unusual about it is I was in lane one, he went by me at an extremely high rate of speed which was more than 64. Upon entering, being right behind, it is unusual to drive -- I was in the right lane -- at 64 miles an hour, based on my experience on the highway, lane three, 64 miles an hour is unusual to me, yes, sir. It is especially when you have a trooper right behind you.

Q. You just said it wasn't unusual, now you changed. Is it or is it not? The first time you answered it's not unusual this rate of speed, now you changed it completely.

A. Well, it is unusual, in lane number three it is.

[18] Q. Lane three to you is the fast lane or?

A. Lane three is the slow lane.

Q. Were any other cars passing, at that time?

A. Any other passing?

Q. Cars passing you or passing the other vehicles?

A. Not to my knowledge.

Q. You were in a marked MSP unit; is that correct?

A. That's correct.

Q. Now, you said that you noticed three occupants in the vehicle?

A. Yes, sir.

Q. What did you say in reference to the back seat passenger?

A. I would see the back seat passenger several times more so than the right front passenger, for some reason unknown to me, I would see, I could see the top of his head go -- I could see his head go below the seat level behind then I wouldn't see him any more.

Q. Tell me where that is, please, where you checked your observations about that back seat passenger?

A. I don't see it in here, sir.

[19] Q. Is there any reference made to anything in this police report in reference to the occupants of the car while

you were observing them; is there anything in here whatsoever about that?

A. Other than the furtive movement, no. Furtive movement upon the stop, not while in motion.

Q. Prior to the stop?

A. No, sir.

Q. You testified all these, what you believe, I guess, to be unusual actions but there is nothing like that mentioned in this police report, is there, Trooper Hughes?

A. No, sir.

Q. The vehicle pulled over to the right shoulder of the road when you put your emergency equipment on, correct?

A. Yes, sir.

Q. You parked directly behind the vehicle, correct?

A. Yes, I did.

Q. The driver who you have identified as Mr. McNichol got out immediately, right?

A. Correct.

Q. What did you tell Mr. McNichol as to why you stopped him?

[20] A. I told him the same reason I told the Court, 64 miles an hour in a 55 mile an hour zone, as well as the tag, I saw no tag on the vehicle other than the rent-a-car paper tag, loosely attached.

Q. Did you ask for his driver's license and registration?

A. Yes.

Q. Did he give those to you?

A. He gave me the driver's license.

Q. What was the driver's license, what did it say about Mr. McNichol, what kind of driver's license was it?

A. Connecticut driver's license, I believe.

Q. Did you ask him any other questions, at that time?

A. Yes, I did.

Q. What did you ask him?

A. I asked him where he was coming from, where he was going to.

Q. What were his answers?

A. He stated that he was coming from Connecticut, going to South Carolina.

Q. Correct and he had a valid Connecticut driver's license?

[21] A. Yes, he did.

Q. Did you ask him to return to the vehicle to get the registration?

A. Yes, I did.

Q. Did he get that for you?

A. No, he did not get the registration for me.

Q. Did you go to the car and ask him for registration, the driver?

A. No, I did not.

Q. You didn't. Okay. Did you run a check on the Enterprise tag, at all, before you went back to that vehicle?

A. Sir, there was no way to run a check by seeing Enterprise Rent-A-Car, you can only run a check by the VIN number. I did not approach the vehicle until the arrests were made, therefore, I was unable to run a check whether the vehicle was wanted or not.

Q. You said also, Trooper, that upon the stop you said something about you saw some more movement, in the car, at the stop; is there anything in your police report that says there was any movement at all, by anyone, upon the stop, the fact that you approached Mr. McNichol?

[22] A. Yes.

Q. Where?

A. Page four of six, bottom part of the page.

Q. Page four of six?

A. Bottom part of the page, last paragraph, due to furtive movement by occupants of the vehicle, starts right there. Here, I will let you see mine.

Q. Bottom of five. Due to furtive movement by the occupants in the vehicle you asked him to get out, that is after Mr. Wilson is already out of the car?

A. Correct.

Q. I am saying prior to that, is there anything, in your police report, that says there was anything unusual about either one of the passengers when you're talking to McNichol or before Mr. McNichol gets out, is there anything in this report?

A. No, sir.

MR. MIX: Thank you. I have nothing further.

MR. STOCKSDALE: I have follow-up with that.

THE COURT: Mr. Calhoun?

BY MR. CALHOUN:

Q. Trooper, you had been a Maryland State [23] Police Officer for eight months as of the time of this arrest; how much of that time was spent on active duty?

A. Sir, I graduated from the Maryland State Police Academy March 12, was in training for two months, out on the road with another trooper, released out on my own May 12.

Q. After May 12 were you assigned to the Elkton Barracks?

A. No, I was not.

Q. Where were you assigned?

A. J.F.K. Highway Barracks right on 95.

Q. Now, the lighting conditions were very good at the time of this stop; is that correct?

A. That's correct.

Q. You did not have your gun drawn at the time that my client is alleged to have gotten out of the car initially; is that correct?

A. No, I did not.

Q. Did he first produce a driver's license of Connecticut or did you first ask him where he was coming from and he said he was from Connecticut; which happened first?

A. I believe he produced the driver's license, as he exited the vehicle, he had the [24] driver's license in his hand.

Q. Did you, at that point, run a check on the license or anything of that nature?

A. Not until I questioned him and not until after, sir, I did not run a check right away.

Q. Now, there is no mention, in your report, isn't it true, there is no mention, in your report, of nervousness or anything of that nature, as pertains to my client, in your report; is that correct?

A. I believe that is correct.

Q. You then directed my client to return to the car to get the registration; is that correct?

A. Yes, sir.

Q. Did my client tell you the car was a rental vehicle?

A. I believe he did, yes.

Q. Did he say that, that he had the registration?

A. He said he did have it in the vehicle, he was unaware, at the time, where it was, that is why he exited with just his license.

Q. Did you then approach the vehicle after he said that -- did my client then return to the vehicle and sit in the vehicle?

[25] A. Yes, he did.

Q. Did my client get the registration?

A. No, he did not.

Q. Did you direct him to get the registration?

A. I asked him, sir, to go back to the car and retrieve the registration; yes, I did.

Q. At some point did my client get the registration?

A. No, he did not.

Q. Did you allow him to get the registration?

A. Sir, the registration was retrieved after the arrest was made.

Q. But when you told my client to go back to get the registration did you have your gun drawn?

A. No, I did not.

Q. Did you allow my client any opportunity to get the registration?

A. Yes, I did.

Q. Then what was my client doing?

A. Your client went back to the car, sir, I don't know what he was doing. I then asked Mr. Wilson to exit the vehicle, upon exiting the vehicle I noticed the CDS drop from his right front pants. At that time my gun was drawn. I saw McNichol [26] reaching underneath the seat, I saw the passenger.

Q. My question is, when you told my client to go back to the car to get the registration do you know what amount of time transpired in order for you to allow him to get the registration?

A. I don't recall the amount of time the time was.

Q. How do you know that my client didn't try to get the registration?

A. I don't know whether or not he did try to get it or didn't try to get it. I just know that I asked him.

MR. CALHOUN: That is all I have, Your Honor.

MR. STOCKSDALE: I have a couple questions.

REDIRECT EXAMINATION

BY MR. STOCKSDALE:

Q. Trooper, were you permitting the driver of the vehicle to get the registration?

MR. CALHOUN: Objection.

THE COURT: Overruled.

Q. Were you permitting the driver to get the registration?

THE COURT: I think he told him to go back [27] and get the registration.

A. Yes, I was.

Q. After you asked him to get the registration why did you approach the passenger?

A. Why did I approach Mr. Wilson?

Q. Yes, tell Judge Bollinger why you approached him.

MR. MIX: Objection.

MR. CALHOUN: Objection.

THE COURT: I sustain as to approach.

Q. Why did you request the passenger exit the vehicle?

MR. CALHOUN: Objection.

THE COURT: Overruled.

THE WITNESS: Well, due to the movement in the vehicle I thought possibly there could be a handgun in the vehicle. I had concern for my safety. At that time when Mr. McNichol went back to the car, I asked Mr. Wilson to step out, that is my whole purpose of not approaching the vehicle, by myself, with three occupants in the vehicle, I wanted each one out at a time to speak to each individual, for my safety.

Q. What was the demeanor of Mr. Wilson when you made contact with him and requested he get out [28] of the car?

MR. MIX: Objection.

THE COURT: The demeanor of Mr. Wilson? He is the passenger. Well, I sustain. How would he know what demeanor is when he is in the car, he is in the back of his car.

Q. Did you have an opportunity to observe Mr. Wilson's demeanor?

A. Yes, I could.

MR. MIX: When? Objection.

MR. STOCKSDALE: I am going to follow-up with that question.

THE COURT: Sustained.

Q. Did you have the opportunity, yes or no?

A. Yes, I did.

Q. When did you have the opportunity to observe the demeanor of Mr. Wilson?

A. When I was standing, which is the front of my patrol car, Mr. Wilson was turned this way, looking at me because I was speaking to him, I was asking him to step from the car, please step back to me, I want to ask him a few questions.

Q. First of all, how far away were you at this point?

A. From ten, fifteen feet, maybe, from [29] wherever the front of my car is, front of my car. I was standing here, then the back of their car. I was at an angle, to where I could see at an angle, where I could see Mr. McNichol, the passenger, Mr. Wilson, and the back seat passenger, as well.

Q. What observations did you make of Mr. Wilson while you were in that position, from that vantage point that you just described?

A. Just in talking with him I could see that he was, he was extremely nervous, he was sweating and not only that, his voice was very shaky.

Q. What did you mean by his voice was very shaky; can you explain exactly what you mean by that to Judge Bollinger?

THE COURT: You have me missing something. I sustain. Who is this, Mr. Wilson?

MR. STOCKSDALE: Yes, Mr. Wilson, with respect to Mr. Wilson.

THE COURT: He is standing back at his car, he sees his face red and shaky, is that what I understand.

THE WITNESS: No, sir.

THE COURT: That is what I missed. Start over, again, Mr. Stocksdale.

A. Maybe if I can stand up I can show you [30] where I was.

Q. If you could demonstrate for Judge Bollinger I would appreciate it.

A. Sir, this would be the back, this would be the violator's vehicle; I'm parked back here, I'm standing to the front of my patrol car, okay.

THE COURT: You are not behind your door?

THE WITNESS: No, no, at this time I am not behind my door, I am at the front of my patrol car, at an angle to where I can see, you would be the driver, the right front passenger would be here and the back seat passenger.

THE COURT: Probably had your eye on their hands?

THE WITNESS: Yes, sir, I was trying to keep an eye on all three at the same time I was speaking with Mr. Wilson, the right front passenger, he was turning around looking at me, I could see his face at that time. I was possibly maybe 10 to 15 feet from him, I could see his face, at that time, he was sweating, I could see the -- just the way he looked, he looked nervous and the way he spoke, he spoke nervous, again, he answered my questions with a question. He was reluctant, he kind of looked at me, didn't answer anything; when he talked his voice [31] was very shaky.

MR. CALHOUN: Your Honor, objection.

MR. MIX: Judge, objection.

THE COURT: I overrule the objections. Next question, Mr. Stocksdale.

BY MR. STOCKSDALE:

Q. How much time lapsed between the time you made that observation you just described to the judge to when you requested Mr. Wilson step from the vehicle?

A. Again, not much time, at all. I would say a minute, at the most, when I asked Mr. Wilson to exit the vehicle, again, he wouldn't do so at first. He was stumbling, he then opened the car door, when he opened the car door, took one step out toward me, I said come back toward me, as he took one step, he was standing kind of -- he was standing like this, with his knees together, for some reason, like he didn't want to move. That made me think,

right there, that he had something on him. I thought possibly a handgun, at that time.

MR. CALHOUN: Objection.

THE COURT: Overruled.

MR. MIX: Continuing objection.

MR. CALHOUN: Continuing objection.

[32] THE COURT: Overruled.

A. Took one step, sir, that is when I observed, through my training, knowledge and experience with the State Police the CDS, which is crack cocaine, tested positive, drop to the ground. At that time I then observed Mr. McNichol have his hand down the front seat. I drew my weapon, extracted the occupant, at gun point, face down, for my safety, as well as theirs.

THE COURT: All right.

BY MR. STOCKSDALE:

Q. Just so we can have this marked for purposes of this motion to suppress this hearing, I am going to show you what's been marked State's Exhibit No. 1 and ask you if you can identify what is -- what is taped in this, not what it eventually was tested to be, but whether you recognize it, where you recognize it from?

A. Yes, I do. This right here, Your Honor, was what dropped from the right front pants leg of Mr. Wilson, at the time I asked him to exit the vehicle. This down here was later found at left front pants pocket.

THE COURT: Talking about a rock like substance of two and a half to three inches in [33] diameter.

A. Correct.

MR. STOCKSDALE: I move to introduce State's 1 for the purpose of the motion to suppress.

THE COURT: All right. That will be Motions Exhibit Number 1, white rock like substance.

MR. STOCKSDALE: I have no further questions.

THE COURT: Mr. Mix?

RECROSS-EXAMINATION

BY MR. MIX:

Q. Again, I am looking at your report here, Trooper Hughes, and I notice it mentions nothing about Mr. Wilson was unusually nervous until he is exiting the vehicle, but now you say you saw him sweating and appeared to be nervous when you were asking him to get out of the car?

A. I have in my report Wilson was unusually nervous and began to shake when exiting the vehicle.

Q. I read the same sentence. This is June 8th, do you what the temperature was on June 8th?

A. No, I don't.

Q. Did you ever go to the vehicle and ask Mr. McNichol where was the registration that he was [34] supposedly getting for you or what was taking him time to get it; did you ever go back to him because he has already given you ID which is fine, everything is fine, he goes back to get that, did you ever go back to say where is your registration?

A. No, I did not, sir, like I said.

MR. MIX: Nothing further, Your Honor.

BY MR. CALHOUN:

Q. Trooper, you eventually recovered a valid registration and valid rental document from the car; is that correct?

A. Yes, sir, I believe that is correct.

Q. Is it your testimony that you were 10 to 15 feet from this car as you were waiting for my client to produce the registration for the vehicle?

A. Your client being Mr. McNichol?

Q. Mr. McNichol, yes, the driver.

A. Yes.

Q. You were 10 or 15 feet behind the car waiting for him to produce the valid registration; is that correct?

A. Yes, I was.

Q. That was for a period of less than a minute?

A. Approximately a period of less than a [35] minute? He was back in the vehicle for longer than a minute. I was getting Mr. Wilson out of the vehicle at that time.

Q. I am not worried about Mr. Wilson, I am asking, under oath, what was the length of time that you allowed for Mr. McNichol, the driver, to produce the valid registration?

A. I don't recall the length of time.

MR. CALHOUN: That is all I have, Your Honor.

THE COURT: Anything else?

REDIRECT EXAMINATION

BY MR. STOCKSDALE:

Q. The valid rental agreement, were either one of these guys on that agreement?

A. I do not have a copy, sir, I thought I did. I believe it was a valid rental agreement, if it was not I think I would have obtained it, kept it for my record.

MR. STOCKSDALE: Thank you. No further questions.

THE COURT: Trooper, how long did the stop take?

THE WITNESS: Before.

THE COURT: From the time you pulled them [36] over, put on your lights, they pulled over, until you drew your gun; how long did that period of time take?

THE WITNESS: Between 5 and 10 minutes, maybe.

THE COURT: Anybody have any questions in light of my questions?

MR. STOCKSDALE: Not in light of yours, Judge.

THE COURT: You may stand down.

MR. STOCKSDALE: Judge, that would be States's [sic] case, as far as the motion to suppress is concerned.

THE COURT: Glad to hear from you.

MR. STOCKSDALE: Do you have any evidence?

THE COURT: I'm sorry.

MR. MIX: No.

MR. STOCKSDALE: Sorry, I just wanted to make sure.

Judge, the key to this case is this whole issue of whether or not an officer, upon approaching a vehicle, can ask either the driver or passenger to -- I will use the term alight from that vehicle. Pennsylvania v. Mimms. Mimms gives an absolutely [37] bright line test when it says --

THE COURT: What is the Maryland case?

MR. STOCKSDALE: Derricott, the first one before it was reversed, but reversed on other grounds.

THE COURT: It was reversed.

MR. STOCKSDALE: It was reversed, no question, but it was clear it was reversed on other grounds. If you read -- I am sure you have both cases, the Court of Appeals does not even address the issue that -- I think it was Judge Moylan addressed in the original Derricott case where it says unequivocally that an officer can request -- because it's a de minimis intrusion -- a driver to alight from a vehicle to ask him about any registration, license, that type of information and the reason is the rationale they accept in Mimms is personal officer's safety, as well as the simple fact that personal safety, in terms of assault on an officer, as well as personal safety in terms of other vehicles on the highway. It also says in Derricott, I think it's not -- I think the Mimms is extended but it also says in Derricott that

they can request a passenger alight from the vehicle, for the very same reasons, simply to ask questions.

[38] Mimms, when you read it, and again, I am certain that this Court has had the opportunity to review that, they talk about, in terms of de minimis intrusion, not only in the insistence of the police on requesting someone to alight from the vehicle not a serious intrusion but it doesn't rise to the level of petty indignity. Judge, it doesn't matter, I am not here arguing because I think my second argument would be the furtive movements that the officer saw that he could conceivably have, I think, he did have articulable suspicion to go with that first prong under Terry and Michigan v. Long to ask information, he did that with respect to the driver, he certainly has the right to do it with the two passengers but doesn't have to reach that point because it's very clear in Derricott that he can make a request of the passenger to alight from the vehicle.

THE COURT: There is no question about the fact that he can make the request under many numerous cases. The question is is the 4th Amendment even triggered when an officer comes up and says, sir, would you mind getting out of the car; the guy can says [sic], yes, I mind getting out of the car, get the hell away from me.

MR. STOCKSDALE: You're right, the Mimms [39] situation found in Derricott doesn't apply the 4th Amendment.

THE COURT: That's not applicable.

MR. STOCKSDALE: I mean it is applicable to this case.

THE COURT: They found that it wasn't even triggered in that case.

MR. STOCKSDALE: What they found was the 4th Amendment is not applicable, but obviously the law is applicable to our scenario here because that is the scenario, it is exactly the same, you're absolutely right, Judge, the 4th Amendment wouldn't apply in that case, therefore, we don't get to that. That is why my first argument is we don't get that to [sic] but even if we did, you have the furtive movements, the limited request of the officer. The Court's question was, it was a very good question, 5 to 10 minutes someone dangerous, someone for 5 to 10 minutes certainly on the side of a roadway where the officer has seen a vehicle, a brand new vehicle with no tags Enterprise sticker or Rent-A-Car tag hanging off is not unreasonable. I would ask the Court to deny the defendant's motion to suppress. First of all, under the Mimms and Derricott exceptions and it's not even an exception. It's just not applying [40] the 4th Amendment, it's not. Certainly the Terry articulable suspicion based on his observations of the movement inside the vehicle.

THE COURT: If the officer is making a strictly Terry stop as opposed to a routine traffic stop or not turning that into an investigative stop, why would he let the driver go back to the car to get the registration card without doing a Terry frisk, at that point?

MR. STOCKSDALE: Because, Judge, he has to have, in the Terry situation, articulable suspicion both as to when he approaches him. He either -- really two prongs he has for articulable suspicion.

THE COURT: You are saying he didn't, at that point -- answer my question, did he or did he not, at that point?

MR. STOCKSDALE: I think he has -- I think he has the right, at that point.

THE COURT: Well, he didn't, he let him go back. What I want to narrow you down to is he either had the right, at that point, and he let him go back or he didn't have the right, at that point, then you tell me what transpired between the time he went back and when he told the other passenger to [41] get out of the car.

MR. STOCKSDALE: As to the initial Terry as it applies to the driver, certainly if he allows him to go back and get the registration and maybe he obtains a registration and he is allowed to satisfy the officer, at that point, that he is not justified in conducting a Terry frisk that he didn't get to because he didn't get out of the car with the registration. So possibly we did not get to the level of where a Terry frisk was justified, but we have a situation where a Terry stop was justified because you need articulable suspicion in each situation to stop and to frisk.

THE COURT: I don't think anybody is arguing there wasn't an articulable suspicion to stop the car.

MR. STOCKSDALE: Right.

THE COURT: Okay, and the officer has a right to ask for a license and registration.

MR. STOCKSDALE: Yes, sir.

THE COURT: Okay, and if he -- as long as he signs a ticket presented to him he is entitled to go his way.

MR. STOCKSDALE: Correct.

THE COURT: Right, okay, so what we have [42] then is you're arguing to me the State says that this is a Terry stop, not an investigation procedure of telling the passenger to get out and what is in my sometimes non-logical mind, some people would say, is what has occurred between him letting the driver go back to the car and when he tells the passenger to get out, that gives him anything, in addition to what he has at the point he lets the driver go back to the car.

MR. STOCKSDALE: Okay. Let me be very clear, in my argument to the Court, that I think that is the second argument. I think the first and the controlling argument is Mimms and Derricott. I don't think there is any question both those control and if the Court follows Mimms and Derricott then we don't reach the Terry issue, but notwithstanding that, then what I am saying to the Court is as to --

THE COURT: Let me ask you this. Hasn't the Court of Special Appeals -- Court of Appeals had ample opportunity to adopt Terry in Mimms for this State?

MR. STOCKSDALE: Judge, it's a Supreme Court case that is followed has been told --

THE COURT: Have they ever quoted it?

MR. STOCKSDALE: Yes, they have.

[43] THE COURT: Where?

MR. STOCKSDALE: In Derricott.

THE COURT: Derricott was reversed.

MR. STOCKSDALE: I understand that, Judge, but, again, it was reversed on other grounds.

THE COURT: Where else have they quoted it?

MR. STOCKSDALE: Judge, I will be honest, that was the case, that was the most recent case.

THE COURT: I want to look at that.

MR. STOCKSDALE: When I Shepardized that was the most recent case. I will be happy to do that for you, sir. I copied all the cases and will present them to you, but it's a Supreme Court case that's been quoted in Derricott, I understand it's been reversed. My suggestion to you is that it was reversed on other grounds.

THE COURT: My problem is that is at this end of the spectrum, then we have the old case of Alford v. State where Judge Moylan reversed a similar thing, 61 Md. Ap.,

where are we, in the middle, that is what I am trying to figure out. Alford is not exactly the factual scenario we have here and this is not the exact factual scenario we have in Derricott.

[44] It's not on all -- what we used to say in law school -- on all 4 points.

MR. STOCKSDALE: I understand that but I think the language of the Court of Special Appeals talks about driver and or passenger and I believe the Court relies on that as good law.

THE COURT: I understand that is what they have said.

MR. STOCKSDALE: Therefore, that is my argument to the Court.

THE COURT: I understand your argument.

MR. STOCKSDALE: Very well, sir.

THE COURT: Let me hear from you, Mr. Mix.

MR. MIX: Judge, if I may, we have here a situation and, in all candor, we have been furnished with discovery, motions filed, we get a police report, I have prepared a defense for the defendant. Nowhere in the police report -- it's admitted today, under oath, by the Trooper -- does he note anything unusual about anybody in this case until after Wilson is out of the car and he admits none of that is in his report. We have a car being stopped going 64 miles an hour and it's posed [sic] 55 on the JFK. And you have

a driver who gets out, who gives him proper identification, he asks him the [45] question where he is coming from; he is coming from Connecticut, has his license, on the way to South Carolina. There is a tag. All this checks out later to be everything in conformity, but if he says that the reason why he decided to get Wilson out is because of these unusual movements, what perplexes me is it's never mentioned in any of his reports that he observed any of the -- I would say a young State Trooper who has been on the force a total of like five months, maybe only a month or so on duty, if he is pursuing this vehicle he has more than ample opportunity to radio for back up if he starts seeing any of these types of movements, he is there five to ten minutes at the scene, he says he basically gets the driver, comes back, gives him all the right answers, says go get his registration. He decides, on his own, he goes to try to get something out of the car, there is absolutely no reason, whatsoever, at this point, for him to do that and I just think the testimony you have heard and the facts, as presented, that Mr. Wilson's rights have been violated. There is no reason, whatsoever, he has to get out of that car or should be asked to get out of the vehicle.

THE COURT: What about that theory that -- [46] you're right, he didn't have to get out of the vehicle but he did.

MR. MIX: I dare say he got him out because the trooper ordered him out of the car. He didn't do that with the first guy. The first guy got out voluntarily, came back, gave him everything he needed. He has nothing in the police report, there is absolutely nothing there about any

unusual actions by any of these parties. He admits that, under oath, he didn't put any of that in his report.

THE COURT: I understand that. Anything else?

MR. MIX: No, sir.

THE COURT: Mr. Calhoun?

MR. CALHOUN: Your Honor, it is my understanding that the trooper did ask Mr. Wilson to exit the vehicle.

THE COURT: Right, he did, and Mr. Wilson could have said, too bad, I ain't getting out. Could have said anything. Troopers have thick skin, they're supposed to get that when they go through the academy.

MR. CALHOUN: The testimony of the trooper is he was 10 to 15 feet behind the car the pertinent time waiting for my client to produce a [47] registration, he says this took 5 to 10 minutes which seems like, I think, that would seem like a lifetime, that really does seem like a bit of a long time for all this to have occurred. I think it is important that there was no attempt here to issue a ticket. There were no guns drawn, so you could perceive that the trooper did not feel himself to be in danger as he is waiting for the registration to be produced. There is no call for backup over this 5 or 10 minute period that he is addressing and I think the Court should lend some credence to the inconsistencies that are contained in the police report as the furtive movements, it is not in the police report but is testified today, in order to buttress the case.

I would give the analogy that Mr. Mix and Mr. Farmer and myself were driving down the road with a questionable tag, going 64 miles an hour and the police pulled us over, I was the driver of the car and I gave the trooper my license and I went back to get my registration. I don't think that the trooper would, at that point, then ask Mr. Mix or Mr. Farmer to get out of the car, no matter what he alleges they were doing. I think he would wait for the registration to be produced. I think that is [48] what they would basically teach you at the training academy. That's not what happened, according to the testimony in the case, everything checked out, the initial story he is from Connecticut, got a license from Connecticut, ultimately everything checked out, valid vehicle, valid registration. I think this is clearly an illegal intrusion as to what happened with Mr. Wilson.

MR. MIX: Judge, if he has any concerns, whatsoever, he certainly is not going to send Mr. McNichol back to the vehicle, he may be sending him back then to get a weapon. He sends him back and there is no way he could have any kind of suspicions about any wrongdoing when he does what he does on that particular day in question, broad daylight.

MR. STOCKSDALE: Judge, we don't get to that point. I understand their arguments. I understand what they are saying to the Court.

THE COURT: Don't get to what point? That was my point that I asked you about.

MR. STOCKSDALE: What I am saying to the Court is that if the Court follows the teachings of Mimms and follows the teachings of Derricott, again, we don't reach that point. But what they are saying essentially is that everything checks out; that's [49] not true.

THE COURT: I understand that. I mean that it is.

MR. STOCKSDALE: I just want the Court -- I am sure the Court obviously heard all the testimony.

THE COURT: The whole question here is -- we have what I call absolutely alert, intelligent, commendable police action, it's getting quagmired in constitutional issues here which you know happens on occasion. Do you agree with me that the 4th Amendment does not authorize such a thing as investigatory Terry stop and frisk?

MR. STOCKSDALE: Judge, there are certain situations, I am going to be totally honest with the Court, what I -- I researched the Mimms point of view, I did look at Terry, I have all the other information downstairs. There is a case on point which talks about investigatory stops, I know it's a recent Maryland case, I have to go downstairs and get it. I think the point there was that any violation of the law permits the stop. I mean here we have a situation where they are arguing it's usual to have 64 in 55.

THE COURT: I am not concerned about the [50] stop of the police officer. Delaware versus Prowell (phonetic) says a uniformed police officer has a right to stop and ask

for a driver's license of anybody who is driving on the public highways.

There is no problem, in my mind, about the stop. The problem is and there is no doubt that the officer did have the legitimate articulable suspicion as to the basis for a stop, then the basis for potentially his own safety. The question is what did he articulate in his testimony to be the basis for then directing the passenger to get out of the car which caused the drop on the ground, in plain view, of the alleged contraband. That is the basis.

MR. STOCKSDALE: I understand that, assuming we're to that point and we're saying that the officer -- and the argument, again, is the officer can do it, anyway, he doesn't have to have a basis.

THE COURT: That is what you say. They say I am not so sure he can. To say a uniformed officer can direct the occupants of any car to get out and if they don't, pull a gun on them and arrest them. That, to me, is a bad arrest. There is no doubt, in my mind, he is telling this passenger, in this case, to get out of the car and the passenger [51] says, I am not getting out of the car, go to hell, he pulls a gun and says get out, you're under arrest, it's a bad arrest.

MR. STOCKSDALE: I understand that. I just know here in the portion of Derricott which deals with Mimms where it says that there is no particularized justification required for asking either the passenger or the driver to get out of the vehicle. No particularized justification is required. The rationale behind this blanket police

perspective is general concern for police safety under such potentially dangerous situations. It is not necessary that there be actual potential -- there be actual dangerous circumstances. The issue is potential and that is all addressed.

THE COURT: You are saying that would allow any police officer to stop any car on the public street with two occupants, demand all three of them get out of the car; is that what you're telling me?

MR. STOCKSDALE: That is what this case says. I am telling you that's what it says.

THE COURT: Where does this case stand; is it in for trial today?

MR. STOCKSDALE: Yes, supposed to be.

[52] THE COURT: Who is the administrative judge?

MR. STOCKSDALE: That would be Judge Howe, I guess, today, I'm not sure.

THE COURT: Well, I want you to go see because I am not prepared to decide this case. I am going to write a written opinion.

MR. MIX: Judge, the only other thing I would throw in, I know it's not exactly Darden (phonetic) but I think you have to look at some of the language about the police officer's interpretive belief is not sufficient to establish reasonable articulable suspicion for an investigatory stop,

particularized suspicion about the individual. I am telling you, until today, for the first time, is there anything that comes from this police officer that there was any kind of unusual movements about anybody that would even give rise to that and I think that is rebutted by the fact he lets this guy go back to the car after being apparently satisfied with everything.

MR. STOCKSDALE: If I can address one more point. I know this is the last word, last word, they had the opportunity.

THE COURT: With some judges that's the [53] way you get the ruling.

MR. STOCKSDALE: I understand that the bottom line is that was the testimony, you obviously can accept or reject it, but Mr. Mix had the opportunity to rebut that with testimony of his own, he didn't; the testimony is what you have so, therefore, I mean, again, you have, as the trier of fact.

THE COURT: Let me -- I am not going to make my decision and determine this case on the fact that somebody is shaking when a uniformed officer stops him. My blood pressure goes up when I see a doctor. People get nervous when they are stopped on the street; but you say that language, you said there need be no particularized interpretation, doesn't the case say that there has to be some reason, though?

MR. STOCKSDALE: I can only say what --

THE COURT: In any event, I am going to read it, myself. What you're going to have to do is get the case continued by the Administrative Judge, I am not going to do it today, I am going to research it.

MR. STOCKSDALE: That is fine.

THE COURT: I think we understand what the [54] issues are, don't need any more memorandum.

MR. STOCKSDALE: 84 Md. Ap. 192, and then it cites Mimms in it. Thank you, sir.

THE COURT: It's interesting.

MR. MIX: Thank you, Your Honor.

MR. CALHOUN: Thank you.

(Hearing concluded.)

Supreme Court, U.S.
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(5)

No. 95-1268

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF MARYLAND,
Petitioner,

v.

JERRY LEE WILSON,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF FOR PETITIONER

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QUESTION PRESENTED

When a police officer makes a lawful traffic stop, does the officer's automatic right to order the driver to exit the vehicle pursuant to *Pennsylvania v. Mimms* extend to passengers in the vehicle?

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties below.

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WHEN A POLICE OFFICER MAKES A LAWFUL TRAFFIC STOP, THE OFFICER'S AUTOMATIC RIGHT TO ORDER THE DRIVER TO EXIT THE VEHICLE PURSUANT TO *PENNSYLVANIA V. MIMMS* EXTENDS TO PASSENGERS IN THE VEHICLE 6

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OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland affirming the judgment of the suppression court is reported, *State v. Wilson*, 106 Md. App. 24, 664 A.2d 1 (1995), and is reproduced in the petition for writ of certiorari. (App. to Pet. for Cert. 1a). A prior unreported order to that same effect is reproduced in the petition for writ of certiorari. (App. to Pet. for Cert. 38a).

The unreported opinion and order of the Circuit Court for Baltimore County, Maryland, granting respondent Jerry Lee Wilson's motion to suppress is reproduced in the petition for writ of certiorari. (App. to Pet. for Cert. 33a).

The order of the Court of Appeals of Maryland denying the State's petition for a writ of certiorari is reported, *State v. Wilson*, 340 Md. 502, 667 A.2d 342 (1995), and is reproduced in the petition for writ of certiorari. (App. to Pet. for Cert. 37a).

STATEMENT OF JURISDICTION

The opinion of the Court of Special Appeals of Maryland affirming the granting of respondent Wilson's motion to suppress was filed on August 30, 1995. The Court of Appeals of Maryland denied the State's petition for writ of certiorari on November 22, 1995. The petition for a writ of certiorari was filed in this Court on February 9, 1996, and was granted on June 17, 1996.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a) and Rule 13.1 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

At approximately 7:30 p.m. on June 8, 1994, Maryland State Police Trooper David Hughes noticed a white 1994 Nissan Maxima driving at what appeared to be a high rate of speed on Interstate 95 in Baltimore County. (J.A. 7-8). Hughes pulled out onto the road and drove directly behind the vehicle, "pacing" it for one mile and determining its speed to be 64 miles per hour in a 55 miles-per-hour zone. (J.A. 9). Trooper Hughes saw that there were no license plates on the car, except that on the back there "was a paper tag kind of hanging half off, half on that said Enterprise Rent-A-Car." (J.A. 8). The officer activated his cruiser's lights and siren, but the driver continued for approximately one and one-half miles before finally stopping. (J.A. 10).

During the pursuit, Trooper Hughes observed that the two passengers in the car were constantly moving. (*Id.*). The front seat passenger turned and looked at Hughes several times, and both passengers continuously ducked below the seat level and then reappeared. (*Id.*). Once the car stopped, Hughes continued to see a lot of movement in

the car, which made him hesitant to approach it. (J.A. 12).

Trooper Hughes, who was alone in his cruiser, got out and saw that the driver of the Nissan had already exited the car. (J.A. 12, 32). The trooper directed the driver, Mr. McNichol, to step back toward him, and Hughes met the driver between their vehicles. (J.A. 12). Hughes advised McNichol that he had been stopped for speeding and asked to see his driver's license and registration card. (J.A. 12, 24). McNichol produced a valid Connecticut license and told the officer that he was on his way from Connecticut to South Carolina. (*Id.*). When McNichol said that the rental papers were in the car, Hughes instructed him to retrieve them. (J.A. 14). Throughout this encounter, McNichol was "unusually nervous." (J.A. 14-15).

Trooper Hughes also observed that the front seat passenger, respondent Jerry Lee Wilson, was sweating and extremely nervous. (J.A. 33). Because Hughes was concerned for his safety, he asked Wilson to get out of the car and step toward him. (J.A. 32, 35-36). After initially refusing to comply with this request, Wilson opened the door and took one step out, whereupon crack cocaine dropped to the ground. (J.A. 35-36).

Wilson was indicted on charges of possession of cocaine with the intent to distribute and related offenses. (J.A. 1). At a suppression hearing held in the Circuit Court for Baltimore County on November 23, 1994, the single issue was whether Trooper Hughes had violated Wilson's Fourth Amendment right to be free from unreasonable seizures when he ordered Wilson to step out of the car. (J.A. 17). Wilson argued that the cocaine should be suppressed because the trooper was not entitled to issue the order. (J.A. 47-49). The prosecutor argued

that the officer had the authority to order Wilson out of the car pursuant to *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), and, alternatively, that the officer had reasonable suspicion to do so. (J.A. 41-42).

On January 10, 1995, the court granted Wilson's motion to suppress, ruling that Trooper Hughes did not have reasonable suspicion to order Wilson out of the car and that *Pennsylvania v. Mimms* did not authorize the trooper to do so automatically. (App. to Pet. for Cert. 34a-35a). The State appealed to the Court of Special Appeals of Maryland, (J.A. 1), which affirmed both aspects of the suppression court's ruling, (App. to Pet. for Cert. 6a-7a, 21a).[1]

SUMMARY OF ARGUMENT

In *Pennsylvania v. Mimms*, this Court recognized the authority of police officers making traffic stops automatically to order drivers out of their vehicles for reasons of officer safety. *Mimms* and subsequent cases suggest that this "automatic exit" rule applies to passengers as well.

That the *Mimms* rule extends to passengers is evident by application of this Court's Fourth Amendment general reasonableness balancing test. A passenger in a car enjoys only minimal privacy and liberty interests because travel on the roadways is highly regulated. When a car is

[1] In its petition for writ of certiorari to the Court of Appeals of Maryland, (J.A. 1), and in its petition to this Court, (Pet. for Cert. 4 n.1), the State pressed only the issue whether the officer had the automatic right to order Wilson out of the vehicle.

stopped because the driver has committed a traffic infraction, the ensuing delay affects the driver and passenger equally. Thus, when an officer orders a passenger to alight, the passenger, like the driver, suffers only a minor incremental intrusion upon his already diminished privacy and liberty interests.

Weighed against this minor intrusion is the government's compelling interest in police officer safety. So-called "routine" traffic stops are potentially dangerous for police officers. Consequently, an officer who stops a car for a traffic violation must be permitted to take reasonable steps to minimize the danger and ensure the safe completion of the stop. Requiring the officer to possess any suspicion of danger before he can act to protect himself would be ineffectual. By the time a sign of danger manifests itself, it may be too late for the officer to react. Waiting could result in the officer's being assaulted or killed. A rule requiring no level of individualized suspicion is the only efficacious way to secure the government's interest in officer safety.

When a passenger's minimal privacy and liberty interests are weighed against the compelling interest in officer safety, only one conclusion can be reached: The *de minimis* intrusion occasioned by the automatic exit order is reasonable under the Fourth Amendment. Because, in this case, the officer was authorized to order respondent Wilson to step out of the car, the cocaine that fell to the ground when he complied with the order was properly seized.

ARGUMENT

WHEN A POLICE OFFICER MAKES A LAWFUL TRAFFIC STOP, THE OFFICER'S AUTOMATIC RIGHT TO ORDER THE DRIVER TO EXIT THE VEHICLE PURSUANT TO *PENNSYLVANIA V. MIMMS* EXTENDS TO PASSENGERS IN THE VEHICLE.

A. *Pennsylvania v. Mimms* and its progeny suggest that a police officer may automatically order all occupants out of a vehicle that is lawfully stopped for a traffic violation.

Thousands of times each day, motor vehicles are stopped for traffic violations. Although labeled "routine," these encounters present real and significant risks to the police. For the most part, the identities, backgrounds, and motivations of motorists so stopped are unknown. Many drivers and their traveling companions, particularly those involved in criminality, carry firearms and other weapons in their cars and are willing to resort to violence rather than risk being identified and arrested. Drunk or drugged persons, whose impaired judgment often leads to volatile behavior, present yet another potential danger. So too, the increased use of motor vehicles for trafficking in illegal drugs enhances the likelihood that an unsuspecting officer will stumble upon a dangerous confrontation when initiating what appears to be a simple traffic stop.

This Court has long recognized the danger inherent in traffic stops. Almost two decades ago, in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), the Court

fashioned a rule permitting police in the course of such encounters to order the driver out of the vehicle without any particularized suspicion that the driver poses a threat to the officer's safety.

This Court has strongly signaled that police also may order passengers out of the vehicle. In *Mimms* itself, the Court balanced the *de minimis* intrusion into the driver's privacy and liberty interests against the State's "legitimate and weighty" interest in protecting officer safety, and concluded that, on balance, it is reasonable for the officer to order the driver to alight without any level of particularized suspicion. *Id.* at 110-11. The Court's holding and the rationale for it prompted three Justices to comment: "Because the balance of convenience and danger is no different for passengers in stopped cars, the Court's logic necessarily encompasses the passenger." *Id.* at 122 (Stevens, J., joined by Brennan & Marshall, JJ., dissenting).

In two subsequent cases, the Court has assumed that the *Mimms* "automatic exit" rule applies to passengers. Two Justices unequivocally so stated just one year after the *Mimms* decision:

> Last Term, this Court determined in *Pennsylvania v. Mimms* that *passengers* in automobiles have no Fourth Amendment right not to be ordered from their vehicle, once a proper stop is made.

Rakas v. Illinois, 439 U.S. 128, 155 n.4 (1978) (Powell, J., joined by Burger, C.J., concurring) (emphasis added) (citation omitted). And, five years later, the Court noted: "In *Pennsylvania v. Mimms*, we held that police may order *persons* out of an automobile during a stop for a traffic violation . . . ." *Michigan v. Long*, 463 U.S. 1032, 1047-48 (1983) (emphasis added) (citation omitted). In light of

Mimms, *Rakas*, and *Long*, it may be said that this Court has tacitly approved orders directed at *anyone* to step out of a stopped vehicle.[2]

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[2] Many courts read *Mimms* as authorizing police as a matter of routine to order all occupants to exit a vehicle or, as the case may be, to remain in the vehicle. *Ruvalcaba v. City of Los Angeles*, 64 F.3d 1323, 1327 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1841 (1996); *United States v. Hill*, 60 F.3d 672, 682 (10th Cir.), *cert. denied*, 116 S. Ct. 432 (1995); *United States v. Powell*, 929 F.2d 1190, 1195 (7th Cir.), *cert. denied*, 502 U.S. 981 (1991); *United States v. Sanders*, 631 F.2d 1309, 1312 n.2 (8th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981); *United States v. McCoy*, 824 F. Supp. 467, 474 (D. Del. 1993); *State v. Webster*, 170 Ariz. 372, 374, 824 P.2d 768, 770 (1991); *People v. Melgosa*, 753 P.2d 221, 225 (Colo. 1988); *State v. Dukes*, 209 Conn. 98, 122, 547 A.2d 10, 22 (1988); *Thomas v. United States*, 553 A.2d 1206, 1207 n.7 (D.C. 1989); *Doctor v. State*, 573 So. 2d 157, 159 (Fla. App. 1991), *rev'd in part on other grounds*, 596 So. 2d 442 (Fla. 1992); *People v. Salvator*, 236 Ill. App. 3d 824, 840, 602 N.E.2d 953, 963 (1992), *appeal denied*, 148 Ill. 2d 651, 610 N.E.2d 1273 (1993); *Warr v. State*, 580 N.E.2d 265, 267 (Ind. App. 1991); *State v. Landry*, 588 So. 2d 345, 347 (La. 1991); *Commonwealth v. Pappalardo*, 10 Mass. App. 897, 897, 409 N.E.2d 815, 816 (1980); *People v. Martinez*, 187 Mich. App. 160, 167 n.5, 466 N.W.2d 380, 384 n.5 (1991), *vacated on other grounds*, 439 Mich. 986, 483 N.W.2d 868 (1992); *State v. Ferrise*, 269 N.W.2d 888, 890-91 (Minn. 1978); *State v. Reynolds*, 753 S.W.2d 1, 2 (Mo. App. 1988); *People v. Robinson*, 74 N.Y.2d 773, 775, 545 N.Y.S.2d 90, 91, 543 N.E.2d 733, 733-34, *cert. denied*, 493 U.S. 966 (1989); *State v. Collins*, 38 N.C. App. 617, 619, 248 S.E.2d 405, 407 (1978); *State v. Gilberts*, 497 N.W.2d 93, 96 (N.D. 1993); *State v. Williams*, 94 Ohio App. 3d 538, 544, 641 N.E.2d 239, 243, *dismissed*, 70 Ohio St. 3d 1446, 639 N.E.2d 114 (1994); *Commonwealth v. Brown*, 439 Pa. Super. 516, 528, 654 A.2d 1096, 1102, *appeal denied*, 664 A.2d 972 (Pa. 1995); *State v. Soares*, 648 A.2d 804, 806 (R.I. 1994); *Graham v. State*, 893 S.W.2d 4, 7 (Tex. App. 1994); *Bethea v. Commonwealth*, 14 Va. App. 474, 476-78, 419 S.E.2d 249, 250-52 (1992) (en banc), *aff'd on other grounds*, 245 Va. 416, 429 S.E.2d 211 (1993); *State v. Richardson*, 156 Wis. 2d 128, 143, 456 N.W.2d 830, 836 (1990). Only a few courts, like the Court of Special Appeals did in this case, read *Mimms* differently. *People v. Maxwell*, 206 Cal. App. 3d 1004, 1008-09, 254 Cal. Rptr. 124, 126-27 (1988); *State v. Becker*, 458 N.W.2d 604, 607 (Iowa 1990); *State v. Smith*, 134 N.J. 599, 616-17, 637 A.2d 158, 166 (1994); *Johnson v. State*, 601 S.W.2d 326, 328-29 (Tenn. Crim. App. 1980).

B. It is reasonable under the Fourth Amendment for the police to order passengers out of a lawfully stopped vehicle without any level of particularized suspicion.

Analysis of the issue under the general reasonableness test confirms what is implicit in *Mimms*: Police are permitted as a matter of routine to order passengers out of a vehicle that has been stopped for a traffic violation.

The "fundamental command of the Fourth Amendment is that searches and seizures be reasonable." *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).[3] Whether a particular

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[3] A police officer's command that a passenger alight from a vehicle, if complied with or forcibly carried out, is a seizure under the Fourth Amendment. *See California v. Hodari D.*, 499 U.S. 621, 626 (1991).

law enforcement practice is reasonable "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *accord Vernonia School Dist. 47J v. Acton*, 115 S. Ct. 2386, 2390 (1995); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989). This approach recognizes that the Fourth Amendment does not prohibit every intrusion, but only "arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976).

The reasonableness balancing analysis has three components. The first factor to be considered is the nature of the interest upon which the search or seizure intrudes. *Vernonia School Dist. 47J v. Acton*, 115 S. Ct. at 2391. The second factor relates to the character of the intrusion. *Id.* at 2393. The third factor involves "the nature and immediacy of the governmental concern at issue," and the efficacy of the means for meeting it. *Id.* at 2394; *accord Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 448-49 (1990); *Brown v. Texas*, 443 U.S. 47, 50-51 (1979).

On balance, the government's interest in officer safety during traffic stops surpasses the countervailing interests of the passenger. And, because the order to leave a lawfully stopped vehicle is but a negligible intrusion and is the most efficacious way of ensuring officer safety, the balance tilts in favor of authorizing the police to issue the order without any level of particularized suspicion.

1. A passenger in a vehicle traveling on a public highway enjoys only minimal privacy and liberty interests.

When Wilson was made to alight from the car, two of his Fourth Amendment interests were implicated: the right to privacy and the right to personal liberty. But, because the exit order came during the course of a traffic stop, these interests were greatly diminished.

"Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements." *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976). Although an individual does not lose all reasonable expectation of privacy when he steps inside a car, *Delaware v. Prouse*, 440 U.S. at 662, he "must expect that the State, in enforcing its regulations, will intrude to some extent" upon that privacy, *New York v. Class*, 475 U.S. 106, 113 (1986). Because vehicles are highly regulated, "the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973); *accord Pennsylvania v. Labron*, 64 U.S.L.W. 3865, 3865 (U.S. July 1, 1996) (per curiam); *California v. Carney*, 471 U.S. 386, 392 (1985).

Thus, all persons who travel on the public roadways, drivers and passengers alike, understand that they may be stopped by governmental agents. Sometimes a stop occurs at a sobriety checkpoint, a border checkpoint, or a toll booth. Other times the stop may be for a traffic violation such as running a red light or, as in this case, speeding. Much like persons who choose employment in closely regulated industries, *Skinner v. Railway Labor Executives'*

Ass'n, 489 U.S. at 627, and school children who elect to participate in school-sponsored athletic programs, *Vernonia School Dist. 47J v. Acton*, 115 S. Ct. at 2393, vehicular travelers voluntarily subject themselves to the highly regulated environment of public thoroughfares.

The regulated nature of highway travel affects not only travelers' privacy, but their liberty as well. To be sure, persons traveling on the highways enjoy an interest in their freedom of movement just as they do in their homes or workplaces, but that interest is more often compromised on the roadways and is significantly reduced as a result.

Both the driver and the passenger have the right, as a general matter, to come and go as they please. But, both have subjected themselves to the highly regulated, and public, nature of highway travel; and, when the car is stopped, both have their freedom of movement legitimately curtailed. Therefore, a passenger in a vehicle stopped for a traffic violation has no greater privacy and liberty interests than does the driver, even though it is the driver whose wrongdoing precipitated the stop. If anything, the passenger's liberty interest when riding in a car is even less than that of the driver because the passenger has relinquished to the driver a large measure of control over the passenger's own right of locomotion. Indeed, when and how a passenger reaches his destination is entirely in the hands of the driver.

In sum, passengers in cars stopped for traffic violations have a diminished interest in their privacy and liberty. While automobile travel has great benefits, travelers knowingly accept the regulatory burdens that go with it.

2. The order to alight from a lawfully stopped vehicle is a minimal intrusion upon the passenger's privacy and liberty interests.

Not all Fourth Amendment seizures of the person are equally invasive. At one end of the continuum is a custodial arrest; a *Terry*[4] stop is a lesser intrusion; and an order to move a short distance in conjunction with a lawful traffic stop is at the opposite end. As this Court made clear in *Pennsylvania v. Mimms*, the last of these seizures is "*de minimis*." 434 U.S. at 111.

The Court explained in *Mimms* that once a vehicle has been lawfully stopped for a traffic violation, the order to a driver to step out is an incremental intrusion.

> The driver is being asked to expose to view very little more of his person than is already exposed. The police have already lawfully decided that the driver shall be briefly detained; the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it. Not only is the insistence of the police on the latter choice not a "serious intrusion upon the sanctity of the person," but it hardly rises to the level of a "'petty indignity.'" *Terry v. Ohio*, *supra*, 392 U.S. [1,] 17 [(1968)]. What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety.

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[4] *Terry v. Ohio*, 392 U.S. 1 (1968).

434 U.S. at 111.[5]

In its practical effect, ordering the passenger to step out of the vehicle is no different. This is so for a number of reasons. First, the order comes on the heels of the passenger's already having been stopped: The laws of physics demanded that when the car in which Wilson was riding was brought to a halt, so too was he. Wilson, of course, was not the recipient of the traffic citation. Nevertheless, as a practical matter, he was forced to remain by the side of an interstate highway until the traffic stop drew to a close. *Cf. Florida v. Bostick*, 501 U.S. 429, 436 (1991) (recognizing that, once aboard a bus that is scheduled to depart, a passenger does "not feel free to leave").

Second, in both spatial and temporal terms, stepping out of a car during a traffic stop is an inconsequential intrusion. Like the driver, Wilson was required to move

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[5] One commentator reads *Mimms* as holding "that some movement of a nonarrest detainee so minimally intrudes upon privacy interests as to render it of no constitutional significance." George E. Dix, *Nonarrest Investigatory Detentions in Search and Seizure Law*, 1985 DUKE L.J. 849, 897. Another commentator reads *Mimms*, as well as *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), and *Michigan v. Summers*, 452 U.S. 692 (1981), as suggesting that, once an initial detention occurs, police have "limited authority" to move a detainee a short distance for purposes other than evidence gathering. Richard A. Williamson, *The Dimensions of Seizure: The Concepts of "Stop" and "Arrest,"* 43 OHIO ST. L.J. 771, 810-11 (1982). This additional movement, in that commentator's view, creates "no fourth amendment problem beyond that inherent in the original stop." *Id.* at 810.

but a short distance and, in doing so, exposed little more of himself to the view of the officer than he did when seated inside the car. *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (occupants of car are "in plain view" when traveling on highways). This modest intrusion pales in comparison to being handcuffed or being delivered to the stationhouse. Moreover, but for the development of probable cause to arrest Wilson, the minor intrusion precipitated by the officer's order to step out would have lasted only the few minutes occasioned by the traffic stop itself. *See Berkemer v. McCarty*, 468 U.S. 420, 437 (1984) (detention of motorist pursuant to traffic stop is presumptively temporary and brief because the vast majority of roadside stops last only a few minutes). The brevity of the intrusion also testifies to its *de minimis* character. *See United States v. Place*, 462 U.S. 696, 709 (1983) (brevity of invasion of Fourth Amendment interest is an important factor in reasonableness inquiry).

Third, the order to alight from the vehicle subjects the passenger to little or no embarrassment, indignity, or concern. Most people at one time or another have been in cars stopped for a traffic violation. Indeed, such stops occur with enough frequency that they come as no surprise to the individuals involved and are greeted with little curiosity by passersby. Given the routine nature of traffic stops and the minimal concern attendant to them, passengers who are told to join the driver in stepping out of the car as part of such a stop suffer little real impact on the "sanctity of the person." *Pennsylvania v. Mimms*, 434 U.S. at 111; *see also Berkemer v. McCarty*, 468 U.S. at 438 (exposure to public view during traffic stops

diminishes motorists' fear of abusive police conduct).[6]

Fourth, the seizure undertaken here is "for prophylactic and distinctly *non*punitive purposes." *Vernonia School Dist. 47J v. Acton*, 115 S. Ct. at 2393 n.2. As is true with the driver, the passenger is not made to step out of the vehicle to facilitate evidence gathering or investigation into criminal activity. Rather, the sole justification for the order is tied to a different concern altogether—the safe completion of a lawful traffic stop.

3. Officer safety is a compelling governmental interest and the automatic right to order passengers out of lawfully stopped vehicles is an efficacious means of satisfying that interest.

Even a minimally intrusive seizure would be unreasonable if not done to further an important governmental interest. But, the government's interest in officer safety is compelling, as this Court has recognized time and time again.[7] Indeed, in *Pennsylvania v. Mimms*

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[6] Doubtless, persons who have evidence of criminality to hide may be concerned if asked to step out of a car. The Fourth Amendment's reasonableness standard, however, does not presuppose the guilty person but, rather, the law abiding citizen. *Florida v. Bostick*, 501 U.S. 429, 438 (1991); *accord Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 452 (1990) (fear and surprise engendered by sobriety checkpoint is measured from perspective of sober motorist).

[7] *E.g.*, *Maryland v. Buie*, 494 U.S. 325, 333-34 (1990); *New York v. Class*, 475 U.S. 106, 116 (1986); *United States v. Hensley*, 469 U.S. 221, 235 (1985); *Michigan v. Long*, 463 U.S. 1032, 1046-48 (1983); *Washington v. Chrisman*, 455 U.S. 1, 7 (1982); *Michigan v. Summers*, 452 U.S. at 702; *Pennsylvania v. Mimms*, 434 U.S. 106, 110-11 (1977) (per curiam); *United States v. Robinson*, 414 U.S. 218, 234-35 (1973); *Adams v. Williams*, 407 U.S. 143, 147-48 (1972); *Chimel v. California*, 395 U.S. 752, 762-63 (1969); *Terry v. Ohio*, 392 U.S. at 23-24; *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967).

the Court declared it "unreasonable to require that police officers take unnecessary risks in the performance of their duties." 434 U.S. at 110 (quoting *Terry v. Ohio*, 392 U.S. at 23).

The risk of immediate harm to police who conduct traffic stops is neither illusory nor insignificant. This Court has emphasized repeatedly that such encounters are particularly dangerous. *See Michigan v. Long*, 463 U.S. at 1049 ("[R]oadside encounters between police and suspects are especially hazardous, and . . . danger may arise from the possible presence of weapons in the area surrounding a suspect."); *New York v. Class*, 475 U.S. at 116-17 (police may effect a seizure of a person stopped for traffic violation, for reasons of officer safety, because cars may contain handguns); *Foley v. Connelie*, 435 U.S. 291, 298 (1978) (even "routine" traffic stops can result in police officers' being wounded or killed, because vehicle occupants may be "armed and engaged in or embarked on serious criminal conduct").

The danger lurking in traffic stops has only intensified in recent years.[8] It is far more likely today that a car will

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[8] Over twenty years ago, this Court cited a study showing "that approximately 30% of the shootings of police

contain a firearm. The design of many of today's vehicles also presents new challenges to the police. The higher ground clearance of four-wheel-drive vehicles, the interior configuration of minivans, and the popularity of tinted windows each make it difficult, if not impossible, for the officer to assess the potential danger involved in the stop.

The Court has explained how removing the driver can reduce the threat of danger:

> Establishing a face-to-face confrontation diminishes the possibility, otherwise substantial, that the driver can make unobserved movements; this, in turn, reduces the likelihood that the officer will be the victim of an assault.

Pennsylvania v. Mimms, 434 U.S. at 110; *see New York v. Class*, 475 U.S. at 116 (recognizing danger to officer in permitting detainee to remain in car with possible access to dangerous weapon). The same holds true for passengers.

If anything, the danger inherent in roadside encounters increases when passengers are present. Like drivers, passengers have access to weapons that may be inside the passenger area of a car. Thus, ordering the driver alone to

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officers occur when an officer stops a person in an automobile." *United States v. Robinson*, 414 U.S. at 234 n.5. A more recent study confirms that officers are frequently assaulted or killed during traffic encounters. In 1994 alone, 5,762 law enforcement officers were assaulted during traffic pursuits and stops. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED 1994, at 71 (1996). From 1985 through 1994, 97 officers were slain in such encounters. *Id.* at 31.

exit does not erase the danger. Moreover, a passenger might well act in concert with the driver or other passengers to ambush the officer, or act alone to do so while the officer is dealing with the driver. The dangers that attend any traffic stop multiply with each additional occupant.[9]

Permitting officers as a matter of routine to control the movements of all occupants in a vehicle lawfully stopped for a traffic violation is the only efficacious means of addressing the concern for officer safety. It is simply impracticable to require the officer to have particularized suspicion of danger before acting to protect himself. By the time the officer detects the threat, the passenger may already have secured a tactical advantage. Indeed, the officer could be wounded or killed before any sign of danger presents itself. *Cf. Vernonia School Dist. 47J v. Acton*, 115 S. Ct. at 2396 (suspicion-based drug testing is impracticable in part because drug-impaired individuals often do not display outward signs of impairment).

For another reason, requiring police to await some indicia of dangerousness on the part of the passenger is

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[9] This is particularly so when the officer makes a traffic stop on suspicion of drunk driving, a not uncommon occurrence. Experience suggests that if the driver is intoxicated, the passenger likely is as well, or the passenger would be the "designated driver." Given the lack of judgment and restraint that often accompanies intoxication, the risk to the officer in dealing with drunk or drugged occupants of a vehicle is even greater than that presented by those who are sober. *See Montana v. Egelhoff*, 64 U.S.L.W. 4500, 4503 (U.S. June 13, 1996) (observing that half of all homicides are committed by persons under the influence of alcohol).

ineffective in protecting the goal of officer safety. The officer's attention must be focused on the driver and on completing the purpose of the traffic stop. The officer ought not (and practically speaking cannot) be made, at the same time, to keep watch over the actions of the passenger. A suspicion-based right of police to order passengers out of vehicles that are lawfully stopped for traffic violations would actually *impair* the government's interest in the safe and successful conduct of those stops. *Cf. id.* at 2396 n.3 (rejecting suspicion-based drug testing of student athletes because such a procedure would "impair other policies important to the institution").

Alternative suspicionless practices would not strike the proper balance between the competing governmental and individual interests. For example, a rule permitting police only to inquire whether a passenger has a weapon would no doubt be reasonable under the Fourth Amendment. But, given a criminal defendant's incentive to lie in responding to this question, such a rule would hardly be efficacious. Likewise, a rule permitting police to frisk every passenger would be an efficacious method of furthering the goal of officer safety, but such a rule may not be reasonable.

This Court in the past has adopted bright-line rules requiring no level of particularized justification to meet the exigencies of the police-citizen encounter at hand and to further the goal of officer safety. *See, e.g., New York v. Belton*, 453 U.S. 454, 458 (1981); *United States v. Robinson*, 414 U.S. 218, 234-35 (1973).[10] As in those

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[10] In other contexts, as well, this Court has struck the balance between competing governmental and individual interests in favor of allowing the intrusion without any level of individualized suspicion: the maintenance of automobile checkpoints for detection of illegal immigrants and contraband, *United States v. Martinez-Fuerte*, 428 U.S. at 561-62, and drunk drivers, *Michigan Dep't of State Police v. Sitz*, 496 U.S. at 455; and the drug testing of school children who participate in school-sponsored athletic programs, *Vernonia School Dist. 47J v. Acton*, 115 S. Ct. 2386, 2396-97 (1995), of railroad employees involved in train accidents, *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 633-34 (1989), and of federal customs officers who bear arms or are involved in drug interdiction, *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989).

cases, officers confronting the inherent dangers of traffic stops should not be forced to pause and ponder the legal subtleties associated with a quantum of proof analysis before taking a limited step to ensure their safety. Instead,

> [a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.

New York v. Belton, 453 U.S. at 458 (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)) (alteration in original); *accord New York v. Quarles*, 467 U.S. 649, 659 (1984) (officers must be left free "to follow their legitimate instincts when confronting situations presenting a danger to the public safety"). During the time taken to analyze the legal ramifications of their conduct, officers could be overpowered, injured, or killed.

Mimms itself is the paradigm for application of an automatic rule to effectuate the goal of officer safety.

Mimms is not the sole example, however. This Court has recognized that the danger inherent in the execution of a warrant to search a home permits police to take reasonable protective steps without any specific justification. *Michigan v. Summers*, 452 U.S. 692, 702-03 (1981) (execution of search warrant may give rise to sudden violence, and risk of harm to police and occupants is minimized if police "routinely exercise unquestioned command of the situation"). A separate warrant authorizing the detention of persons at the scene is not required because the search warrant "implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.* at 705 (footnote omitted). Nor are officers "required to evaluate either the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure." *Id.* at 705 n.19.

The reasoning of *Summers* applies with equal force to traffic stops. Not only are the exigencies of officer safety and law enforcement virtually identical in both situations, so too is the minimal nature of the intrusion upon the individual. Thus, much like a search warrant, the authority to stop a vehicle for a traffic violation carries with it the authority to execute the stop safely and without interference. The directive to all occupants that they alight from the vehicle is a necessary "incident" to the traffic stop.[11]

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[11] In other situations where an initial intrusion is already justified, the Court has authorized an additional intrusion to permit officers to carry out their duties safely. *See, e.g., Chimel v. California*, 395 U.S. at 762-63 (incident to arrest, police may search area within arrestee's immediate control); *New York v. Belton*, 453 U.S. 454, 460 (1981) (incident to arrest, police may search passenger compartment of car); *New York v. Class*, 475 U.S. at 119 (incident to traffic stop, police may search car to obtain vehicle identification number); *South Dakota v. Opperman*, 428 U.S. 364, 375-76 (1976) (incident to impoundment, police may inventory contents of automobile).

4. On balance, the minimal intrusion occasioned by the order to alight is outweighed by the compelling governmental interest in officer safety.

Taking into account all the factors considered above—the minimal privacy and liberty interests at stake, the *de minimis* intrusion occasioned by the order to alight, and the importance of the government's interest in safeguarding the lives of police officers—the balance weighs heavily on the government's side. These same considerations were at issue in *Mimms* and produced the rule that police may automatically order a driver to alight from a lawfully stopped vehicle. The rule can be no different for passengers. The risk to officer safety is the same, if not greater, when passengers are present, and the intrusion is just as minimal with respect to the passenger as it is with the driver.

To be sure, the passenger presumably had nothing to do with the wrongdoing that led to the initial stop of the car. It is enough to say in answer to this point, however, that the order to Mimms himself to alight had nothing to do with his initial wrongdoing, but, instead, was tied to the potential danger presented by a person seated in a car. *Pennsylvania v. Mimms*, 434 U.S. at 110; *Michigan v.*

Long, 463 U.S. at 1047-48; *New York v. Class*, 475 U.S. at 116.

Moreover, the presumed innocence of the passenger does not mean that he is insulated from police intrusion. In a number of situations, police have the authority to control the movements of innocent persons. Whenever police evacuate a building in response to a bomb threat, secure a crime or accident scene, or reroute traffic around an Independence Day parade, they necessarily direct the movement of persons who have done no wrong.

In other contexts, this Court has implicitly authorized even more invasive intrusions into an individual's privacy or possessory interest in furtherance of law enforcement goals unrelated to the individual. Police may search jointly owned property and possessions even though the justification for the search is predicated upon the conduct of only one of the joint possessors. Police may enter a home to search for and arrest a resident, *Payton v. New York*, 445 U.S. 573, 603 (1980), to accompany someone already arrested, *Washington v. Chrisman*, 455 U.S. 1, 6-7 (1982), or to search for victims at a crime scene, *Mincey v. Arizona*, 437 U.S. 385, 392 (1978), notwithstanding that the entry into the home and search therein intrudes upon the privacy of fellow residents.

Similarly, police may search the entire interior of a car incident to the arrest of one of its occupants, *New York v. Belton*, 453 U.S. at 460, even though other occupants of the car would almost certainly be made to exit the car to facilitate the search, and would have any of their own belongings in the passenger compartment examined in the course of that search. And, police may conduct inventory searches of an impounded vehicle, *South Dakota v. Opperman*, 428 U.S. at 375-76, despite the fact that items

in the car that are searched may belong to persons who have done nothing wrong. In short, merely because an intrusion affects "innocent" third parties does not make it unreasonable.

The contours of Maryland's proposed rule are clear and precisely tied to the justification for it: During the brief time it takes to complete a traffic stop, the officer should be permitted to take limited measures to control the movement of all occupants for the sole purpose of ensuring the officer's safety. Ordering all occupants out of the vehicle is one such measure.[12]

As was the case in *Mimms*, Maryland "does not, and need not, go so far as to suggest that an officer may frisk the occupants of any car stopped for a traffic violation." 434 U.S. at 110 n.5. Neither does Maryland argue that "whenever an officer has an occasion to speak with the [occupants] of a vehicle, he may also order the [occupants] out of the car," *id.* at 111 n.6, much less that the rule authorizes the police to remove the occupants from the scene, *cf. Dunaway v. New York*, 442 U.S. at 216 (probable cause required to take suspect to police station);

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[12] Depending on the circumstances, of course, the officer may deem it more appropriate to have the occupants remain in the vehicle. *See New York v. Class*, 475 U.S. at 115 (keeping driver of vehicle in car during routine traffic stop is typical police practice). The reasoning underlying Maryland's proposed rule would necessarily permit officers to take this course of action as well. The propriety of a police order to passengers to remain in the car is pending in another case before this Court. *Dennis v. State*, 342 Md. 196, 674 A.2d 928 (1996), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. July 18, 1996) (No. 96-112).

Davis v. Mississippi, 394 U.S. 721, 727-28 (1969) (same).

Rather, the rule simply—and only—authorizes the police to neutralize the potential danger inherent in all traffic stops by controlling the movements of passengers until the brief encounter safely draws to a close. The limited intrusion occasioned by an order to alight in no way can be characterized as "arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U.S. at 554. Like the rule of *Mimms*, the rule proposed here is consonant with the Fourth Amendment.

C. Because Trooper Hughes was entitled to order Wilson to step out of the car, the trooper was also entitled to seize the cocaine that was exposed as a result.

When Trooper Hughes ordered Wilson to step out of the car in which he had been riding as the front seat passenger, a quantity of what Hughes reasonably suspected was (and ultimately proved to be) cocaine fell to the ground. Because Hughes was authorized to issue the command to Wilson, the resultant exposure of the cocaine was in Hughes's "plain view," and he was entitled to seize it. *See Minnesota v. Dickerson*, 508 U.S. 366, 374-75 (1993); *Horton v. California*, 496 U.S. 128, 136-37 (1990).

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that the judgment of the Court of Special Appeals of Maryland be reversed.

Respectfully submitted,

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(D)

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No. 95-1268

In The

Supreme Court of the United States

October Term, 1995

STATE OF MARYLAND,

Petitioner,

v.

JERRY LEE WILSON,

Respondent.

On Writ Of Certiorari To The
Court Of Special Appeals Of Maryland

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

When a police officer makes a lawful traffic stop, does the officer's automatic right to order the driver to exit the vehicle, pursuant to *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), extend to passengers in the stopped vehicle?

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WHEN A POLICE OFFICER MAKES A LAWFUL TRAFFIC STOP, THE AUTOMATIC RIGHT TO REQUIRE THE DRIVER TO EXIT THE VEHICLE CANNOT CONSTITUTIONALLY BE EXTENDED TO PASSENGERS, WHEN THERE IS NO REASONABLE SUSPICION THAT THE PASSENGER HAS COMMITTED ANY WRONGDOING OR POSES ANY THREAT TO OFFICER SAFETY, PARTICULARLY WHEN SUCH A RULE WOULD INSULATE POLICE CONDUCT -- AND MISCONDUCT -- FROM JUDICIAL REVIEW 2

A. Judge Moylan, a nationally recognized Fourth Amendment scholar, correctly analyzed this Court's decisions in *Mimms*, *Rakas*, and *Long*. He correctly ruled that this Court has never permitted the police to automatically require a passenger to exit a vehicle, merely because the passenger is in a vehicle that has been lawfully stopped for a traffic violation 3

1. In *Mimms*, this Court addressed the de minimis additional intrusion of requiring the driver to exit a lawfully stopped vehicle, but the Court did not address passengers 5

2. In *Rakas*, this Court addressed the standing of a passenger to challenge a vehicle search, but the Court did not address the seizure of passengers, much less whether *Mimms* extends to passengers. Therefore, the substitution of the word "passengers" for the word "drivers," in a footnote in the concurrence, when referring to *Mimms*, is legally insignificant ... 7

3. In *Long*, this Court addressed whether a valid frisk, based on reasonable suspicion of threat to officer safety, permits a search of the vehicle, but the Court did not address whether *Mimms* extends to passengers. Therefore, the Court's substitution of the word "persons" for the word "drivers," when referring to *Mimms*, is legally insignificant.. 9

4. In properly analyzing and applying this Court's precedents, Judge Moylan carefully and thoroughly explained (1) just how narrow the *Mimms* holding is, and was intended to be, and (2) that *Mimms*, *Rakas*, and *Long* are as distinguishable from the case at bar as they are from each other 10

B. It is unreasonable, under Fourth Amendment jurisprudence, for the police to have the per se power, as to all passengers, in all vehicles,

under all circumstances, to demand that the passenger exit the vehicle, when there is no reasonable suspicion of passenger wrongdoing and no threat to officer safety, and the passenger is merely present when the driver violates a traffic regulation 13

1. **The seizure of persons requires reasonable suspicion of some wrongdoing, based on specific articulable facts, applying an objective standard. As such, the Fourth Amendment does not permit an automatic right to seize any passenger, when there is no reasonable suspicion as to that passenger. To make such a rule would extend unfettered discretion to the police and insulate their conduct from judicial review** 14

2. **Passengers, like all persons, maintain a high reasonable expectation of privacy in their personal integrity, which is not waived merely by becoming a passenger. Although passengers anticipate a brief delay in their journey if the driver violates a traffic regulation, they should not be subjected to a seizure of their person merely by their presence in the vehicle, absent any wrongdoing on their part** 18

3. **A mere incremental additional intrusion upon a driver, who has already been lawfully intruded upon, is de minimis. However, when the police demand that a passenger exit the vehicle, despite a lack of any reasonable suspicion of wrongdoing by the passenger, such an intrusion upon the passenger's Fourth Amendment rights is not de minimis and is unconstitutional.** 22

4. **The State's reliance on *Summers* and *Acton* is misplaced. The additional intrusion in *Summers* was permitted primarily because of the underlying judicial determination of probable cause, in the context of a validly executed warrant. The intrusion in *Acton* was permitted solely because it applied equally to all public school athletes and was not subject to the unfettered discretion of a particular governmental official** 27

C. **If this Court were to extend *Mimms* to passengers, much of the reasonableness analysis, slowly and carefully evolved by this Court since *Terry*, would be overruled** 31

1. **To permit the police, under a per se rule, to remove any passenger, at any time, from any vehicle, based solely on a traffic violation of the driver, without requiring any level of suspicion as to the passenger, would unconstitutionally extend unfettered discretion to the police and would unconstitutionally place the conduct of the police beyond judicial review** 32

2. **Even the important governmental interest in officer safety should not serve as the basis to**

retreat from the Fourth Amendment requirement of an objective standard of reasonableness, subject to judicial review, to which this Court has steadfastly adhered 36

3. Even if officer safety were sufficient justification for (1) overruling the requirement of reasonable suspicion, and (2) eliminating judicial review as a check on police discretion, extending *Mimms* to passengers will not accomplish the desired goal. There is no evidence to indicate that a rule providing unfettered discretion to the police will enhance officer safety 39

D. No Fourth Amendment issue could be less appropriate for the adoption of a bright-line rule than the issue now before this Court. The State's proposed rule would "draw the line" in such a way as to extend unfettered discretion to the police, and thus insulate police conduct from judicial review. Moreover, by applying a bright-line rule in the context of the most frequent of all citizen-police encounters, this Court would be deeming an almost limitless variety of situations to be constitutionally indistinguishable 41

E. Because Trooper Hughes was not constitutionally entitled to automatically require Wilson to exit the vehicle, the evidence seized was a fruit of the poisonous tree. Accordingly, the trial court correctly ruled

that the evidence must be suppressed, and the appellate court correctly affirmed the judgment of the trial court. 48

CONCLUSION 48

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

No. 95-1268

STATE OF MARYLAND,
Petitioner,
v.

JERRY LEE WILSON,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

The Respondent accepts the Statement of the Case as presented by the State, with the following exceptions:

The State, relying solely on the testimony the Trooper Hughes, claims that the trooper witnessed constant movement by the front and rear seat passengers, and that the passengers "*continuously* ducked below the seat level and then reappeared." Pet. Brief at 2 (emphasis added). However, the trial court, as fact finder on the suppression motion, found only that the two passengers "turned and

looked at the trooper four or five times, their heads went up and down four or five times, and they looked 'furtively.'" Pet. App. at 33a. The Honorable Charles E. Moylan, Jr., writing for a unanimous Court of Special Appeals of Maryland, concluded that Trooper Hughes noticed only that the passengers had on "several occasions" ducked below the seat. Pet. App. at 2a.

The State claims that "Hughes continued to see a lot of movement in the car, which made him hesitant to approach it." Pet. Brief at 2-3. However, neither the trial court, nor Judge Moylan, found that the trooper either: (1) witnessed a lot of movement in the vehicle after it pulled over, or (2) was hesitant to approach the vehicle after it pulled over. Pet. App. at 2a-3a, 33a-34a.

The State claims that Wilson exited the vehicle upon the trooper's request only "[a]fter initially refusing to comply with the [officer's request.]" Pet. Brief at 3. However, neither the trial court, nor Judge Moylan, found that Wilson ever initially refused to obey the trooper. Pet. App. at 2a-3a, 33a-34a.

ARGUMENT

WHEN A POLICE OFFICER MAKES A LAWFUL TRAFFIC STOP, THE AUTOMATIC RIGHT TO REQUIRE THE DRIVER TO EXIT THE VEHICLE CANNOT CONSTITUTIONALLY BE EXTENDED TO PASSENGERS, WHEN THERE IS NO REASONABLE SUSPICION THAT THE PASSENGER HAS COMMITTED ANY WRONGDOING OR POSES ANY THREAT TO OFFICER SAFETY, PARTICULARLY WHEN SUCH A RULE WOULD INSULATE POLICE CONDUCT -- AND MISCONDUCT -- FROM

JUDICIAL REVIEW.[1]

A. Judge Moylan, a nationally recognized Fourth Amendment scholar, correctly analyzed this Court's decisions in *Mimms*, *Rakas*, and *Long*. He correctly ruled that this Court has never permitted the police to automatically require a passenger to exit a vehicle, merely because the passenger is in a vehicle that has been lawfully stopped for a traffic violation.

The State argues that the opinion of Judge Moylan[2] is

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[1]A de novo review of whether the trooper had reasonable suspicion to order Wilson to exit the vehicle should not be conducted by this Court. Although this Court has held that an appellate court may conduct a de novo review of reasonable suspicion, the Court also stated that appellate courts "should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Ornelas v. United States*, 116 S. Ct. 1657, 1663 (1996). Additionally, the State petitioned both this Court and the Court of Appeals of Maryland "only [on] the issue [of] whether the officer had the automatic right to order Wilson out of the vehicle." Pet. Brief at 4 n.1.

[2]Judge Moylan's interpretation of the Fourth Amendment should not be taken lightly. He has served for 26 years on the Court of Special Appeals of Maryland. During that time, Judge Moylan has authored 103 published opinions resolving Fourth Amendment issues and has participated on a three-judge panel resolving Fourth Amendment issues, in a published opinion, on 274 occasions. Additionally, he authored the 147-page search and seizure section of Richard P. Gilbert & Charles E. Moylan, Jr., *Maryland Criminal Law: Practice and Procedure* (1983 & Supp. 1990). Of Judge Moylan's 12 books and articles, one other book and five law review

contrary to precedent of this Court. Pet. Brief at 6-8. The State is incorrect. In his opinion, Judge Moylan (1) correctly analyzed *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), *Rakas v. Illinois*, 439 U.S. 128 (1978), and *Michigan v. Long*, 463 U.S. 1032 (1983); (2) rectified a linguistic error of his own court in *Derricott v. State*, 84 Md. App. 192, 578 A.2d 791 (1990), *rev'd*, 327 Md. 582, 611 A.2d 592 (1992);[3] and (3) properly distinguished *Rakas* and

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articles analyze the Fourth Amendment, to include: *The Right of the People to be Secure: An Examination of the Fourth Amendment* (1976 & rev. 2d ed. 1979); *The Fourth Amendment Inapplicable vs. the Fourth Amendment Satisfied: The Neglected Threshold of "So What?"*, 1977 S. Ill. U.L.J. 75; *The Automobile Exception: What It Is and What It Is Not -- A Rationale in Search of a Clearer Label*, 27 Mercer L. Rev 987 (1976); *The Inventory Search of an Automobile: A Willing Suspension of Disbelief*, 6 U. Balt. L. Rev. 203 (1976); *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 Mercer L. Rev. 1047 (1975); *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 Mercer L. Rev. 741 (1974). He served for six years as the elected State's Attorney for Baltimore City, following five years as the Deputy State's Attorney and an Assistant State's Attorney. In 1968, Judge Moylan was named Outstanding Prosecutor for the nation by the National District Attorneys' Association. He is a former president of the Maryland State's Attorneys' Association and vice-president of the National District Attorneys' Association. Judge Moylan has served as an adjunct law professor at both the University of Maryland School of Law and the University of Baltimore School of Law. He has lectured to prosecutorial and judicial groups in all 50 states on Fourth Amendment issues.

[3] In *Derricott v. State*, 84 Md. App. 192, 578 A.2d 791 (1990), *rev'd*, 327 Md. 582, 611 A.2d. 592 (1992), the Court of Special Appeals of Maryland used the phrase "and/or any of the passengers" to describe persons that the police may require to exit

Long from *Mimms* and from the case at bar. Judge Moylan's opinion correctly explains that *Mimms*, *Rakas*, and *Long* are as distinguishable from the case at bar as they are from each other. Accordingly, neither *Rakas* nor *Long* should be read as interpreting *Mimms*. Judge Moylan's opinion demonstrates that the State incorrectly relies on dicta. To the contrary, his opinion strictly follows, and does not deviate from, this Court's precedents.

1. In *Mimms*, this Court addressed the de minimis additional intrusion of requiring the driver to exit a lawfully stopped vehicle, but the Court did not address passengers.

Mimms was driving with an expired license plate. *Id.* at 106. When the police stopped Mimms, an officer asked him to exit the vehicle and to produce appropriate documents. *Id.* In framing the issue, this Court stated:

> [W]e need presently deal only with the narrow question of *whether the order to get out of the car, issued* [to the driver] *after the driver was lawfully detained, was reasonable and thus permissible under the Fourth Amendment*,

Id. at 109 (emphasis added), even though the officer had no reason to suspect foul play from the particular driver at the time of the stop, there having been nothing unusual or suspicious about his behavior. The Court's holding was also

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a lawfully stopped vehicle. Pet. App. at 14a-15a. In his decision, Judge Moylan refuted that proposition, explicitly stating that "[t]he overly broad inclusion of the phrase 'and/or any of the passengers' [in *Derricott*] was simply wrong. *Pennsylvania v. Mimms* did not stand for so broad a proposition." Pet. App. at 15a.

narrow, as follows:

> [W]e do not hold today that "whenever an officer has an occasion to speak with the driver of a vehicle, he may also order the driver out of the car." *We hold only that once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures.*

Id. at 111 n.6 (emphasis added). The Court further noted:

> "[T]he reasonableness . . . of the particular governmental invasion of a citizen's personal security [requires a balance] between the public interest and the individual's right to personal security free from arbitrary interference by law enforcement officers."

Id. at 109. Thus, in *Mimms*, this Court balanced society's interest in officer safety with the driver's interest in personal liberty, occasioned not by the initial lawful stop, but by the subsequent order to exit the vehicle. The Court reasoned that because the officers had already lawfully decided that the driver be briefly detained, the additional intrusion could only be described as de minimis. *Id.* at 111.

Mimms was accompanied by a passenger. The State did not address the passenger, arguing only "that it [was] permissible to order the *driver* out of the car." *Id.* at 110 n.5 (emphasis added). Moreover, the Court, after acknowledging the existence of the passenger, by stating that "[t]he other occupant of the car was carrying a .32-caliber revolver," made no further mention of the passenger or of the Fourth Amendment rights of passengers. *Id.* at 107. Instead, the Court addressed only the additional intrusion of the already validly stopped driver.

The failure of the Court to even address the Fourth

Amendment rights of passengers only reinforces the understanding that *Mimms* (1) did not create an automatic right for the police to demand that passengers of lawfully stopped vehicles exit the vehicle, and (2) recognized that the Fourth Amendment interests of passengers and drivers in validly stopped vehicles are different.

2. In *Rakas*, this Court addressed the standing of a passenger to challenge a vehicle search, but the Court did not address the seizure of passengers, much less whether *Mimms* extends to passengers. Therefore, the substitution of the word "passengers" for the word "drivers," in a footnote in the concurrence, when referring to *Mimms*, is legally insignificant.

In *Rakas,* the police received a robbery call describing the vehicle. 439 U.S. at 130. Upon stopping the vehicle, the police required the four occupants to exit the vehicle. The interior of the vehicle was searched and weapons were seized. *Id.* Rakas was neither the owner, nor the driver, of the vehicle, and he did not assert a possessory interest in the evidence seized. *Id.* at 129.

Mimms and *Rakas* are so distinguishable that the analysis of one cannot possibly assist in the analysis of the other. *Rakas* cannot support a reading of *Mimms* beyond its narrow holding. First, the factual scenarios are different. *Mimms* involved a routine traffic stop, whereas *Rakas* involved a vehicle containing suspects of a robbery, an inherently dangerous felony. The police who stopped Mimms had no reason to suspect wrongdoing or that Mimms or his passenger posed any threat to officer safety. 434 U.S. at 109. The stop in *Rakas,* on the other hand, presented a robbery situation, in which weapons could reasonably be expected,

thus providing reasonable suspicion of a threat to officer safety.

Second, the legal issues are different. Mimms was a driver who challenged the "seizure" of his person. Conversely, Rakas was a passenger who challenged the "search" of the vehicle. Thus, in *Mimms*, this Court was presented with a Fourth Amendment compliance issue as to the seizure of a person, i.e., whether requiring a driver to exit a vehicle, following a valid traffic stop, was reasonable under the Fourth Amendment. The entire *Mimms* opinion concerned the merits of the constitutionality of the police action in requiring Mimms to exit the vehicle.

In *Rakas*, on the other hand, this Court was presented with a Fourth Amendment applicability issue as to the search of a vehicle, i.e., whether a passenger has standing to challenge evidence seized during a search of the vehicle, absent either a reasonable expectation of privacy in the area searched or a possessory interest in the automobile and/or the items seized.

Because "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted," Rakas lacked standing to challenge the seizure of the evidence. 439 U.S. at 133-34. Moreover, Rakas did not challenge the constitutionality of being required to exit the vehicle. Because Rakas's rights were not implicated, the Court never reached the merits of his Fourth Amendment challenge. As such, this Court had no occasion to conduct a reasonableness analysis in *Rakas*.

Notwithstanding the lack of relevance of *Mimms* in resolving *Rakas*, the *Rakas* concurrence stated: "[T]his Court determined in . . . *Mimms* that passengers in automobiles have no Fourth Amendment right not to be ordered from their vehicle, once a proper stop is made." *Id.*

at 155 n.4 (Powell, J., joined by Rehnquist, J. (now C.J.), concurring). Thus, the *Rakas* concurrence, without discussion or subsequent citation to *Mimms*, sua sponte substituted, in a footnote, the word "passengers" for the word "drivers," even though passenger rights were not discussed by the Court in *Mimms*.

3. In *Long*, this Court addressed whether a valid frisk, based on reasonable suspicion of threat to officer safety, permits a search of the vehicle, but the Court did not address whether *Mimms* extends to passengers. Therefore, the Court's substitution of the word "persons" for the word "drivers," when referring to *Mimms*, is legally insignificant.

In *Long*, this Court granted certiorari "to consider the narrow issue of the authority of a police officer to protect himself by conducting a *Terry*-type search of the passenger compartment of a motor vehicle during the lawful investigatory stop of the occupant of the vehicle." *Id.* at 1037. Finding that the police had reasonable suspicion that Long posed a danger, the Court stated: "[P]rotection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger . . ." *Id.* at 1049.

Because Long had already voluntarily exited the vehicle when the police arrived, the Court did not have an occasion to address the constitutionality of requiring a driver or a passenger to exit a vehicle. Thus, the issue in *Long*, like the issue in *Rakas*, did not involve the *Mimms* issue.

Like *Mimms* and *Rakas*, *Mimms* and *Long* are so distinguishable that the analysis of one cannot possibly assist in the analysis of the other. Like *Rakas*, *Long* cannot support

a reading of *Mimms* beyond its narrow holding. First, the factual scenarios are different. *Mimms* involved a routine traffic stop, whereas, in *Long*, the officers had reasonable suspicion that Long posed a danger to officer safety. *Id.* at 1032. Second, the legal issues are different. Because Long voluntarily exited his vehicle, he did not allege that he was seized unconstitutionally. Instead, he challenged only the search of the vehicle and subsequent seizure of his property. Thus, the *Long* Court did not have before it the *Mimms* issue, much less the applicability of the *Mimms* holding to passengers.

In *Long*, this Court misstated its narrow *Mimms* holding, as follows:

> In . . . *Mimms*, we held that police may order *persons* out of an automobile during a stop for a traffic violation, and may frisk those *persons* for weapons if there is a reasonable belief that they are armed and dangerous.

463 U.S. at 1047-48 (emphasis added). The Court, without discussion or subsequent citation to *Mimms*, sua sponte substituted the word "persons" for the word "drivers," even though only driver rights were discussed in *Mimms*.

4. In properly analyzing and applying this Court's precedents, Judge Moylan carefully and thoroughly explained (1) just how narrow the *Mimms* holding was intended to be, and (2) that *Mimms*, *Rakas*, and *Long* are as distinguishable from the case at bar as they are from each other.

Judge Moylan cautioned against "extract[ing] too much meaning from . . . *Mimms*," correctly stating:

> The simple holding of . . . *Mimms* is that whenever a police officer stops a vehicle for a traffic violation, even of the most minor variety, it is reasonable for the officer to order the *driver* to alight from the vehicle . . .
>
> . . .
>
> The [*Mimms*] holding was very clear that the prerogative is automatic under such circumstances and that no individual or particularized suspicion that the *driver* might be armed is involved. . . . Once the lawfulness of the initial stop of the vehicle is established, nothing more need be shown on a case-by-case basis to justify the incremental intrusion of ordering the *driver* out of the vehicle.

Pet. App. at 7a-9a (emphasis added). Judge Moylan noted:

> In its opinion [in *Mimms*], the Supreme Court made it clear that its focus was very narrow. . . . The only issue before the Supreme Court was the propriety of the [] act of ordering Mimms to step out of the vehicle after it had been stopped.

Id. at 8a. Judge Moylan correctly stated that *Mimms* "was completely silent on the police prerogative, if any, vis-a-vis a passenger." *Id.* at 9a. He stated that once the existence of the passenger was noted in *Mimms*, "the armed passenger dropped totally from sight and the opinion does not further allude to him even obliquely." *Id.* at 10a.

Judge Moylan explained: "The State does not simply argue that . . . *Mimms* should be extended to passengers; it argues that the *Mimms* principle has *already* been extended to passengers," by virtue of dicta in *Rakas* and *Long*. *Id.* at 10a (emphasis added). Judge Moylan criticized the State's reliance on "the most *obiter* of *dicta*[, which] should represent no more to us than the glib blandishments of a snake oil salesman, no matter who wrote them." *Id.* at 11a.

As to *Long*, Judge Moylan stated:

> In . . . *Long*, the Supreme Court was not remotely dealing with a . . . *Mimms* situation. [*Long*] was a case, rather, where there was undeniable articulable suspicion that an individual might be armed and dangerous. . . . The . . . *Mimms* principle itself was not being considered.

Id. at 11a-12a. As to *Rakas*, Judge Moylan stated:

> The citation to *Rakas* is to a footnote in a concurring opinion. The issue for decision in *Rakas* had nothing to do with the police prerogative to order a driver or a passenger to alight from an automobile. It dealt exclusively with the standing of a "mere passenger" to raise a Fourth Amendment challenge to the search of someone else's automobile.

Id. at 13a-14a.

With regard to this Court's use of the word "passenger," instead of the word "driver," Judge Moylan stated:

> The deceptively broad reference to "passengers" was simply wrong. It should, more carefully, have been a more limited reference to "drivers." That distinction, however, was not remotely involved in the discussion and should not be given a significance that was never intended.

Id. at 14a. Regarding this Court's word choices in *Rakas* and *Long*, Judge Moylan stated:

> [The writers did what] opinion writers sometimes do. On an immaterial issue and casually in passing, they characterized . . . *Mimms* as they remembered it, but they remembered it wrongly. They did not put down a pen in mid-sentence and run to the United States Reports for the obvious reason that the passing reference was not in any way the focus of

consideration.

Id. at 15a.

> *Mimms* addressed only the
>
> very narrow question of whether the order to get out of the car, issued [to the driver] after the driver was lawfully detained, was reasonable and thus permissible under the Fourth Amendment,

434 U.S. at 109. Even when the officer had no reason to suspect foul play from the particular driver, at the time of the stop, there was nothing unusual or suspicious about his behavior. Accordingly, *Mimms* stands for the narrow proposition

> that once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures.

Id. at 111 n.6.

Judge Moylan applied *Mimms*, which was the only applicable Supreme Court precedent, neither extending it, nor narrowing it. At the same time, he put *Rakas* and *Long* into perspective, both vis-a-vis *Mimms*, and vis-a-vis the case at bar. Thus, Judge Moylan's opinion reflects an understanding of the narrow holding in *Mimms*, as well as how *Mimms* was misstated in dicta in both *Rakas* and *Long*.

B. It is unreasonable, under Fourth Amendment jurisprudence, for the police to have the per se power, as to all passengers, in all vehicles, under all circumstances, to demand that the passenger exit the vehicle, when there is no reasonable suspicion of passenger wrongdoing and no threat to officer safety, and the passenger is merely

present when the driver violates a traffic regulation.

1. The seizure of persons requires reasonable suspicion of some wrongdoing, based on specific articulable facts, applying an objective standard. As such, the Fourth Amendment does not permit an automatic right to seize any passenger, when there is no reasonable suspicion as to that passenger. To make such a rule would extend unfettered discretion to the police and insulate their conduct from judicial review.

In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court recognized that in all cases of reasonableness,

> [The] inquiry is a dual one--whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.
>
> . . .
>
> [I]t is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to [seize] against the invasion which the [seizure] entails."
>
> . . .
>
> [T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. [I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, *not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience*.

Id. at 19-21, 27 (emphasis added). *Accord United States v. Sokolow*, 490 U.S. 1, 10 (1989) ("must require the agent to articulate the factors leading to that conclusion.").

In *Delaware v. Prouse*, 440 U.S. 648 (1979), this Court recognized the need for an objective, judicially reviewable standard, when it stated:

> The essential purpose of the proscription in the Fourth Amendment is to impose a standard of "reasonableness" upon the exercise of discretion by government officials, including law enforcement agents, in order "to safeguard the privacy and security of individuals against arbitrary invasion. . . ." Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against "an objective standard . . ."

Id. at 654. *Accord Horton v. California*, 496 U.S. 128, 138 (1990) ("evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer"). In *Prouse*, the Court also stated:

> To insist neither upon an appropriate factual basis for suspicion directed at a particular [individual] nor upon some other substantial and objective standard or rule to govern the exercise of discretion, "would invite intrusions upon constitutionally guaranteed

> rights based on nothing more substantial than inarticulate hunches. . . . " This kind of standardless and unconstrained discretion is the evil that the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.

440 U.S. at 661.

In *Steagald v. United States*, 451 U.S. 204 (1981), this Court stated:

> [A]n "officer engaged in the often competitive enterprise of ferreting out crime" . . . may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual's interests in protecting his own liberty.

Id. at 212.

> [G]ood faith on the part of the [] officers is not enough. If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons . . ." only in the discretion of the police.

Beck v. Ohio, 379 U.S. 89, 97 (1964).

In *Dunaway v. New York*, 442 U.S. 200 (1979), this Court observed that "[b]ecause *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope." *Id.* at 210. *See Prouse*, 440 U.S. at 648 (random checks for drivers' licenses and vehicle registration not permitted on less than reasonable suspicion). The Court emphasized that, in *Terry*, it had

> stressed the limits of its holding: the police officer's belief that his safety or that of others is in danger *must be objectively reasonable--based on reasonable inferences from known facts*--so that it can be tested

> at the appropriate time by 'the more detached, neutral scrutiny of a judge,' and the extent of the intrusion must be carefully tailored to the rationale justifying it.

442 U.S. at 209 n.11 (emphasis added).

"[A]n assessment of the whole picture must yield a particularized suspicion that the particular individual being stopped is [or will be] engaged in wrongdoing." *United States v. Cortez*, 449 U.S. 411, 418 (1981). "This *demand for specificity* in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry*, 392 U.S. at 21 n.18 (emphasis added).

This Court's analysis, as to passengers, should focus, not on the driver, but on whether the police had a reasonable suspicion to believe that the passenger was engaged in, or is about to engage in, wrongdoing or poses a threat to officer safety. When the justification for requiring a passenger to exit the vehicle is no more than the fact that the driver was speeding, the seizure of the passenger is unreasonable. An officer conducting a traffic stop may detain the driver only as long as is reasonably necessary. Any expansion of the stop, to include investigation of a passenger, should be permitted only if the officer has reasonable articulable suspicion of wrongdoing as to the passenger. *Terry*, 392 U.S. at 27.

The initial stop of the driver, occasioned by the driver's traffic violation, has the incidental effect of also detaining the passenger. This valid initial stop does not violate the Fourth Amendment rights of either the driver or the passenger. However, further seizure of the passenger "would require satisfaction of an individualized suspicion standard." *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 451 (1990). Without individualized suspicion as to the

passenger, the passenger has the right to resume his journey immediately. In *Prouse*, this Court recognized that notwithstanding the vital interest in highway safety, reasonable articulable suspicion was required to stop a driver. 440 U.S. 648. If there is no reasonable suspicion that the passenger is engaged in wrongdoing or poses a threat to officer safety, then the police may not intrude on the passenger's Fourth Amendment rights.

In the typical traffic stop, there is justification for stopping the driver. This is not the case with respect to passengers. The police have no individualized suspicion to stop the passenger, because the passenger has done nothing wrong. By contrast to the driver, who has committed a traffic violation, the passenger, without more, is merely someone that the "officer has an occasion to speak with [and thus he may not] also order the [passenger] out of the car." *Mimms*, 434 U.S. at 111 n.6. Therefore, any further intrusion on the passenger, beyond the mere inconvenience of being in a stopped vehicle, must be supported by reasonable suspicion, by the officer, as to the passenger.

2. Passengers, like all persons, maintain a high reasonable expectation of privacy in their personal integrity, which is not waived merely by becoming a passenger. Although passengers anticipate a brief delay in their journey if the driver violates a traffic regulation, they should not be subjected to a seizure of their person merely by their presence in the vehicle, absent any wrongdoing on their part.

A passenger's expectation, upon seeing flashing lights, is that the passenger "will be obliged to spend a short period of time [waiting in the vehicle,] but that in the end [the

passenger will] continue on his way." *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984).

Unlike the driver, who is required to produce both a license and registration when stopped, "a passenger is not required to furnish identification or any other documentation." Pet. App. at 20a. Passengers may sit freely in the passenger seat and enjoy the ride, and when stopped, "the passenger is presumptively free to abandon the driver to the clutches of the law and hail a cab." *Id.*

The reasonable suspicion as to the driver cannot be transferred to the passenger merely because of passenger status. A citizen's "mere presence" in a suspected vehicle, or "mere presence" with others suspected of wrongdoing, is insufficient to establish reasonable suspicion as to the citizen who is merely present.

In *United States v. Di Re*, 332 U.S. 581 (1948), this Court held that probable cause to search a vehicle does not permit the police to search the person in the vehicle. *Id.* at 586. "We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled." *Id.* at 587. The police had no information regarding Di Re other than "his presence." *Id.* at 592. "*Presumptions of guilt are not lightly to be indulged from mere meetings.*" *Id.* at 593 (emphasis added).

In *Sibron v. New York*, 392 U.S. 40 (1968), the defendant was seen talking to known narcotics addicts over an eight-hour period. The police did not know Sibron, had no information about him, did not hear any of the conversations, and saw nothing pass. "So far as [the officer] knew, they might indeed 'have been talking about the World Series.'" *Id.* at 62. Mere association "is simply not the sort of reasonable inference required to support an intrusion by

the police upon an individual's personal security." *Id.*

In *Ybarra v. Illinois*, 444 U.S. 85 (1979), the police had a warrant to search a tavern and to search the bartender. Upon entering, the officers announced that they were going to conduct a "cursory search for weapons." *Id.* at 88. "The agents knew nothing in particular about Ybarra, except that he was present." *Id.* at 91. This Court stated: "Each patron . . . was clothed with constitutional protection against . . . an unreasonable seizure." *Id.* The initial valid intrusion "gave [the police] no authority whatever to invade the constitutional protections possessed individually by the tavern's customers." *Id.* at 92. "[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to [a valid Fourth Amendment intrusion of] that person." *Id.* at 91.

In *Reid v. Georgia*, 448 U.S. 438 (1980) (per curiam), the agent believed that Reid fit a "drug courier profile." *Id.* at 440. This Court concluded that "the agent's belief . . . was more an 'inchoate and unparticularized suspicion or 'hunch' than a fair inference in the light of his experience." *Id.* at 441. The Court observed that these "circumstances describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure." *Id.*

As stated in *Katz v. United States*, 389 U.S. 347, 351 (1967), "the Fourth Amendment protects people, not places." The passenger of a vehicle is subject to the brief detention that is required when an officer pulls over the speeding driver. However, the driver's infraction does not lower the passenger's expectation that the passenger will be free from an additional seizure directed at the passenger.

Citizens do not waive the Fourth Amendment, upon

entering an automobile. *See Prouse*, 440 U.S. at 663. A passenger in a vehicle enjoys the same "everyday expectations of privacy that we all share." *Minnesota v. Olson*, 495 U.S. 91, 98 (1990). "[T]he exercise of one's desire to be mobile does not, of course, waive one's right to be free of unreasonable government intrusion." *Cardwell v. Lewis*, 417 U.S. 583, 591 (1974). Even a passenger in a taxicab may rely upon the protection of the Fourth Amendment. *See Katz*, 389 U.S. at 352.

Although a passenger may lack standing to complain about the search of the driver's vehicle, the passenger never lacks standing to challenge the legality of his detention pursuant to a traffic stop. *See Rakas*, 439 U.S. 128. To the extent that this Court recognizes a lesser expectation of privacy in vehicles, such a lesser expectation relates only to the personal effects within the vehicle, but does not mean a lesser expectation of privacy as to the integrity of the person. *See Cardwell*, 417 U.S. at 590.

In *Prouse*, this Court stated:

> Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. [P]eople are not shorn of all Fourth Amendment protection when they step from their homes [into their automobiles.]

440 U.S. at 662-63.

It is virtually impossible to function in our society without the use of a vehicle and public roads. In 1993, of the 197,663,000 Americans of driving age, 173,149,313 were licensed. Federal Highway Administration, U.S. Dept. of Transportation, Pub. No. FHWA-PL-95-028, *Our Nation's Highways: Selected Facts and Figures* 42-45 (1995). Thus, 87.6% of all persons of driving age were licensed. In Maryland, in 1993, there were 3,274,392 licensed drivers, constituting 85.2% of the State's driving-age population. *Id.* If more than 85% of the driving-age population has a license, driving is part of the very fabric of our society.

Not only do seven out of every eight Americans of driving age possess a driver's license, they extensively use this privilege to meet the demands of their everyday lives. In 1993, the number of vehicle miles traveled in this country, per licensed driver, was 13,264. *Id.* at 45. In Maryland, the number was 13,227. *Id.* "American's motor-vehicle travel in 1993 reached 2.3 trillion vehicle miles, an average of 11,834 miles [per vehicle]. Automobiles are responsible for 70.7 percent of this travel." *Id.* at 1. The average driver spends approximately 365 hours per year driving a vehicle. *Id* at 31. To say that "vehicular travelers voluntarily subject themselves to the highly regulated environment of public thoroughfares," Pet. Brief at 12, is to say that once any American steps off the front porch step, and into the minivan to go to work, to school, or to play, or steps onto a bus operated by a mass transit system, that person has elected to become the subject of a suspicionless seizure. That is simply not the reality of our society's relationship with vehicular travel.

3. A mere incremental additional intrusion upon a

driver, who has already been lawfully intruded upon, is de minimis. However, when the police demand that a passenger exit the vehicle, despite a lack of any reasonable suspicion of wrongdoing by the passenger, such an intrusion upon the passenger's Fourth Amendment rights is not de minimis and is unconstitutional.

In *Mimms*, this Court placed great importance on the fact that the driver had already been lawfully stopped. The only valid reason for the police to stop the vehicle is the individualized suspicion as to the driver, based on the driver's wrongdoing. If so, the police may require the driver to exit the vehicle, allowing the officer to make that de minimis additional intrusion upon the driver. "[T]he police have already *lawfully decided* that the driver shall briefly be detained; [and] the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it." 434 U.S. at 111 (emphasis added). The Court even noted, in response to Justice Stevens's dissent, that "[w]e hold only that once a motor vehicle has been *lawfully detained* for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures." *Id.* n.6 (emphasis added).

Although requiring the driver to exit the vehicle is a mere de minimis additional intrusion upon the driver, such an intrusion upon an innocent passenger cannot be deemed de minimis. Demanding that a passenger exit the vehicle is a significantly more pronounced invasion of the passenger's Fourth Amendment rights than it is upon the driver's rights. This already greater intrusion upon the passenger results from the fact that, although the driver has been detained

based on his own wrongdoing, the passenger has been detained, not based on his own wrongdoing, but based on someone else's wrongdoing. Without reasonable suspicion of wrongdoing, on the part of the passenger, any police intrusion into the passenger's Fourth Amendment rights, is significant, is unconstitutional, and is not de minimis.

Unlike the driver, who is in control of the vehicle, and who violates the law, thereby invoking a valid stop, the passenger has no control over the vehicle and presumptively commits no wrongdoing. "The passenger may not be issued a traffic ticket or citation, let alone be subjected to custodial arrest." Pet. App. at 20a. "The passenger is not required to furnish identification or any other documentation." *Id.* "The passenger is presumptively free to abandon the driver to the clutches of the law and hail a cab." *Id.* Indeed, if the passenger is in a hurry, the passenger may exit the vehicle and hail a taxi to reach the desired destination.

> [A]utomobiles are justifiably the subject of pervasive regulation by the State, [and e]very *operator* of a motor vehicle must expect that the State, in enforcing its regulations, will intrude to some extent upon that *operator's* privacy."

New York v. Class, 475 U.S. 106, 113 (1986) (emphasis added). These reasonable intrusions for inspection, licensing, and traffic ordinance violations are directed at the operator. A passenger, by contrast, has no obligation to conform to such pervasive regulations, other than obeying applicable laws, e.g., wearing a seatbelt.

In the case at bar, the initial interference imposed on both the driver and passenger was the traffic stop based on the driver's speeding. Pet. App. at 2a. Because there was no reasonable suspicion of any wrongdoing on the part of the passenger, the scope of that stop should have begun and

ended with the driver. Any intrusion on the passenger, beyond the initial stop, cannot be justified solely by the initial valid stop of the driver. Police action with respect to passengers must be judged independent of the driver. The initial "detention of the passenger[] [was] no more than an inevitable incident of the stopping of the car." Pet. App. at 21a. The subsequent seizure, however, was neither inevitable nor incidental.

Wilson was seized solely by virtue of being a passenger in a vehicle in which the driver was speeding. It was not Wilson's wrongdoing that caused the stop, and Wilson's mere presence in a vehicle with a traffic violator does not make Wilson a suspect. "[A] traffic stop per se does not, without more, focus suspicion on a passenger as either a wrongdoer or as a possible source of danger to the officer." Pet. App. at 23a. Thus, the officer's action of requiring Wilson to exit the vehicle was, as to Wilson, a significant additional intrusion, with no justification, and thus not de minimis.

Moreover, if *Mimms* is extended to passengers, then presumably if a passenger can be automatically required to exit a vehicle, the passenger can automatically be required to remain in the vehicle -- in both scenarios -- absent reasonable suspicion that the passenger poses a threat to officer safety. The State concedes that to adopt its proposed *Mimms* extension, permitting the police to automatically demand that a passenger exit a vehicle, once that vehicle has been lawfully stopped, would permit the police to automatically make a passenger remain in the vehicle.[4] To

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[4]This situation is pending before this Court in *Dennis v. State, 342 Md. 196,* 674 A.2d 928, *petition for cert. filed,* 65 U.S.L.W. 3085 (July 18, 1996) (No. 96-112).

deny to the passenger, in a vehicle stopped for speeding, the right to exit the vehicle and to hail a cab would constitute an even better intrusion on the passenger.

The State argues that the intrusion as to the passenger is de minimis simply because the passenger is not being asked to move far. This Court has never held that the "size" of the intrusion determines whether the intrusion is unreasonable. This is evidenced by this Court's decision in *Minnesota v. Dickerson*, 508 U.S. 366 (1993), in which the officer's mere "squeezing, sliding and otherwise manipulating the content's of the . . . pocket," of an otherwise validly frisked person, violated the Fourth Amendment. *Id.* at 378. If the intrusion "goes beyond what is necessary . . . it is no longer valid . . . and its fruits will be suppressed." *Id.* at 373.

In *Dickerson*, the police already possessed reasonable suspicion that the citizen posed a threat. Nonetheless, it violated the Fourth Amendment to go beyond the permissible scope of intrusion. In this case, unlike *Dickerson*, there was no reason whatsoever for the additional seizure of the passenger. Accordingly, it was an even greater intrusion to require Wilson to exit the vehicle than it was, in *Dickerson*, to discern evidence, by the touch of outer clothing, during a valid frisk for weapons.

In *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995), this Court held that if an officer has an arrest warrant or a search warrant, knows that the suspect possesses a firearm, and knows that the suspect has been dealing drugs, a balancing test must be conducted to determine if it is reasonable for the police to make the "additional intrusion" of failing to "knock and announce" before executing the warrant. The failure to knock and announce is clearly less intrusive than seizing a passenger. If a balancing test is required for the additional intrusion of not knocking and announcing, a balancing test

surely should be required when the police order a passenger, for whom there is no reasonable suspicion of wrongdoing, to exit a vehicle.

In *Maryland v. Buie*, 494 U.S. 325 (1990), even with an underlying valid arrest, this Court rejected even a limited protective sweep unless the "officer possesses reasonable belief based on *specific and articulable facts* that the area to be swept harbors an individual posing danger to those on arrest scene." *Id.* at 337 (emphasis added). This Court stated:

> [D]espite the danger that inheres in on-the-street encounters and the need for police to act quickly for their own safety, the Court in *Terry* did not adopt a bright-line rule . . . for . . . all confrontational encounters. Even in high crime areas, where the possibility that a given individual is armed and dangerous is significant, *Terry* requires reasonable, individualized suspicion . . .

Id. at 334 n.2.

When the police demand that a passenger exit the vehicle, despite a lack of any reasonable suspicion of wrongdoing by the passenger, such an intrusion upon the passenger's Fourth Amendment rights is not de minimis and is unconstitutional.

4. The State's reliance on *Summers* and *Acton* is misplaced. The additional intrusion in *Summers* was permitted primarily because of the underlying judicial determination of probable cause, in the context of a validly executed warrant. The intrusion in *Acton* was permitted solely because it applied equally to all public school athletes and was not subject to the unfettered discretion of a particular governmental official.

The State relies on *Michigan v. Summers*, 452 U.S. 692 (1981), in arguing that the governmental interest in officer safety outweighs the intrusion on the passenger. In *Summers*, in permitting the police to require a resident to remain on the premises while the police executed a search warrant, this Court stated:

> *Of prime importance* in assessing the intrusion *is* the fact that the police obtained *a warrant* to search respondent's house for contraband. A neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had authorized a substantial invasion of the privacy of the persons who resided there.

Id. at 701 (emphasis added).

In *Summers*, the incremental intrusion was reasonable because there was a probable cause determination, by a neutral and detached magistrate. In this case, however, there was no determination by the trooper -- much less by a neutral and detached magistrate -- of probable cause -- much less of reasonable suspicion -- as to Wilson. The only determination was that the vehicle and its driver could be stopped for a traffic violation. When Wilson was seized, merely by his presence in the vehicle, the officer had made no determination linking Wilson with any wrongdoing.

In *Summers*, this Court emphasized that

> the type of detention imposed here is not likely to be exploited by the officer or unduly prolonged in order to gain more information, because the information the officers seek normally will be obtained through the search and not through the detention.

Id. at 701. Unfortunately, traffic stops are ripe for such exploitation by the police.

The State relies on *Vernonia School Dist. 47J v. Acton*,

115 S. Ct. 2386 (1995). In *Acton,* the suspicionless intrusion was permitted because "the subjects of the [school drug testing] Policy [for athletes] are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster." *Id.* at 2391. This Court stated:

> The most significant element in this case is . . . that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.

Id. at 2396. "[T]he nature of [the State's] power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." *Id.* at 2392.

The Court addressed the low expectation of privacy of school athletes, analogizing school athletes to

> adults who choose to participate in a "closely regulated industry," [in that] students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.

Id. at 2393. The student athletes were even more like adults in closely regulated industries in that they were placed on notice that they would be tested for drugs through a consent form they were required to sign. *Id.* at 2394.

"Special needs" cases contain guidelines and controls to ensure that officials conducting the intrusion do not act arbitrarily or for the wrong motives. In *Acton,* every student athlete was required to submit to a drug test at the beginning of each season. *Id.* at 2389. In addition, once a week, during the season, the names of all the athletes were placed in a pool from which a fellow student, with the supervision of two adults, blindly drew the names of 10% of the athletes for random testing. *Id.* at 2388-89. This system ensured that no

student would be targeted for drug testing based on behavior, popularity, or any other arbitrary factor. Indeed, the Court found the guarantees of impartiality, created by subjecting all student athletes to drug testing, to be of upmost importance.

There are two important reasons why *Acton* cannot be argued to extend *Mimms* to passengers. First, all the student athletes were tested. Not only will all passengers, in all vehicles, not be required to exit the vehicle, but probably only a very few passengers will be selected. Second, in *Acton,* there was no discretion by school officials as to which students were tested. To the contrary, the police will have unfettered discretion, lacking judicial review, as to the "if," the "when," the "where," and the "who," regarding any police demand to exit the vehicle. The only way to make this case analogous to *Acton* would be to require all police, to require all passengers, to exit all vehicles, every time a stop is conducted.

The Court also found it "significant that the tests at issue here look only for drugs." *Id.* at 2393. The procedures ensured that the tests would not be used for any other purpose, and an independent laboratory conducted the urinalysis. There are no such measures to limit the scope and purpose of random seizures when the police demand that a passenger exit a vehicle, yet the police lack particularized suspicion as to the passenger.

In each of the relevant cases, at least one of two constitutional safeguards was present that is not present in this case. In *Mimms* and *Summers*, there was a prior lawful intrusion as to the person or the premises. In *Acton*, like in other administrative searches and fixed checkpoint stops, there was a strong regulatory scheme to ensure that the police did not abuse their discretion. For every case that does not come within one of these two categories, this Court

has always required individualized suspicion as a prerequisite to a Fourth Amendment intrusion.

C. If this Court were to extend *Mimms* to passengers, much of the reasonableness analysis, slowly and carefully evolved by this Court since *Terry*, would be overruled.

If *Mimms* were extended to passengers, much of the Fourth Amendment protections against unreasonable seizures would be overruled. In *Terry*, this Court observed:

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure of the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?

392 U.S. at 21-22.

Only by holding that the 25 plus million passengers stopped annually are all presumed to pose a threat to officer safety could this Court justify extending *Mimms* to passengers. Alternatively, this Court would have to permit every traffic violation, as to the driver, to be transferred to the passenger, based solely on the passenger's presence in the vehicle. In either event, to so hold, this Court would obliterate the very protections that comprise the Fourth Amendment.

1. To permit the police, under a per se rule, to remove any passenger, at any time, from any vehicle, based solely on a traffic violation of the driver, without requiring any level of suspicion as to the passenger, would unconstitutionally extend unfettered discretion to the police and would unconstitutionally place the conduct of the police beyond judicial review.

In *Brinegar v. United States*, 338 U.S. 160 (1949), Justice Jackson recognized two Fourth Amendment truths: (1) wherever the Court draws the line, the police "will push to the limit," and (2) citizens cannot prevent Fourth Amendment abuses. *Id.* at 182 (Jackson, J., dissenting). He further reflected:

> [A]n illegal . . . seizure usually is a single incident, perpetrated by surprise, conducted in haste, kept purposefully beyond the court's supervision and limited only by the judgment and moderation of officers whose own interests . . . are often at stake. . . . There is no opportunity for injunction or appeal to disinterested intervention. The citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence.
>
> And we must remember that the authority which we concede to conduct . . . seizures without warrant may be exercised by the most unfit and ruthless officers as well as by the fit and responsible . . .

Id.

If the police have the automatic right to require a passenger to exit a vehicle, with no reasonable suspicion as to the passenger, this detention scenario is more likely to be exploited by the police or unduly prolonged. If the passenger, whose only involvement is a mere presence in a

vehicle being stopped for a traffic violation, is required to exit the vehicle, why was this passenger selected, while perhaps 999 other passengers, each of whom similarly posed no threat to officer safety, were not?

To approve the seizure of innocent passengers, with no reasonable suspicion of any wrongdoing, subjects innocent passengers "to potentially unlimited interference with their use of the highways, solely at the discretion of the [police.]" *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975). If this Court were to extend *Mimms*, the "[t]roublesome problem of selective enforcement," *United States v. Flum*, 518 F.2d 39, 48 (8th Cir. 1975) (Heaney, J., dissenting), will become evident, and there will be no constitutional roadblock to, and no judicial review of, such unconstitutional police conduct.

In *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), this Court held that fixed check point stops do not violate the Fourth Amendment because, by stopping all vehicles, there is little opportunity for the police to abuse their discretion. However, the Court held that random stops, without reasonable suspicion, do violate the Fourth Amendment because there are no guidelines to prevent abuse by the police. *Id.* at 559. The "discretion of the official in the field," *Camara v. Municipal Court*, 387 U.S. 523, 532 (1967), may not be unfettered, but must be supported by objective criteria demonstrating a reasonable suspicion.

Just last term, in *Whren v. United States*, 116 S. Ct. 1769 (1996), this Court held that an officer's motivation is not relevant, provided there is probable cause. The Court distinguished *Florida v. Wells*, 495 U.S. 1 (1990), *Colorado v. Bertine*, 479 U.S. 367 (1987), and *New York v. Burger*, 482 U.S. 691 (1987), from the case before it. In the distinguished cases, the "ulterior motives" of the police

mattered, while in *Whren*, the "ulterior motives" did not matter, because the intrusion was supported by probable cause. In the case now before the Court, the additional intrusion on the passenger was not conducted with reasonable suspicion as to the passenger, much less probable cause. Thus, in this case, unlike in *Whren*, the lack of probable cause necessitates a rule that precludes unfettered police discretion.

If the police have the automatic right to require a passenger to exit the vehicle, with no Fourth Amendment justification required, and no mechanism for judicial review, the police may act solely on the passenger's appearance, age, race, or gender. It is this type of unfettered discretion that makes the seizure of the passenger unreasonable and violates the Fourth Amendment. The fear of being arbitrarily "selected" is particularly strong in minority communities, in which a citizen, merely because of skin color, may meet an officer's profile of a drug dealer. *See Derricott v. Maryland*, 327 Md. 582, 611 A.2d 592 (1992).[5]

In *Terry*, one of the concerns of this Court was the potential for abuse by officers if a standard less than probable cause were employed. 392 U.S. at 14-15. The Court, in assuaging its concern that minority members would be unfairly seized, stressed that it is vital that the exclusionary rule be administered by the judiciary and not by the police. *Id.* at 15. Unfortunately, the tension between the

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[5]In *Derricott*, the officer testified that the defendant was stopped because he matched characteristics listed on a drug courier profile, as follows; (1) *young, black males* wearing expensive jewelry, (2) driving expensive cars, usually sports cars, (3) carrying beepers, and (4) in possession of telephone numbers. 327 Md. at 585, 611 A.2d at 594 (emphasis added).

police and minority communities is just as profound -- if not more profound -- 28 years after *Terry*, as it was at the time of *Terry*.[6]

If *Mimms* were extended to passengers, any officer, with no reasonable suspicion as to any passenger, would nonetheless be able to select any passenger for seizure. With no criteria for selection, and with no opportunity for judicial review, this Court should be concerned about the potential 50 million plus seizures. Recognizing that only one in 1,000 passengers will likely be required to exit the vehicle, this Court should be even more concerned about the grave potential for arbitrary selection and enforcement.

It is unconstitutional to grant to the police unbridled discretion to conduct seizures of citizens, with no requirement for reasonable articulable suspicion as to the targeted citizen. Not only will the police have unfettered discretion to engage in fishing expeditions for evidence, the reasonableness of their actions will forever escape judicial

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[6]*See, e.g.*, Gregory Kane, *Giving Unhappy Readers Their Say in Print Again*, Balt. Sun., Jul. 13, 1996, at 1B (75% of the stops made by the Maryland State Police are of African Americans); *ACLU Accuses Police of Race-Base Stops*, Pantagraph (Bloomington Ill.), Aug. 31, 1994, at A4 (ACLU filed a class-action suit against the Illinois State Police, alleging illegal stops of vehicles driven by African Americans and Hispanics); Debra Dennis, *Judge Gives Green Light to Lockland Police Lawsuit*, Cin. Post., Mar. 23, 1994, at 9A (police accused of illegal stops of African American drivers); Joe Schoenmann, *City Exec Calls Meeting on Traffic Tickets, Race*, Wis. St. J., Jun. 7, 1996, at 2A (African American drivers ticketed more than whites); Dennis Hoffman, *Is Patrol Making Race-Based Stops?*, Omaha World-Herald, Oct. 13, 1994, at 25 (minority drivers accused state police of making illegal, racially-based traffic stops to search for drugs).

review.

If the Court extends *Mimms* to passengers, it will be holding, for the first time, that the seizure of a citizen, without particularized suspicion, and without external procedures and guidelines, is reasonable. Moreover, this Court would be ruling that regardless of how few passengers are seized, and regardless of how arbitrary the selection process, such seizures are preapproved, as constitutional, and are not subject to judicial review.

2. Even the important governmental interest in officer safety should not serve as the basis to retreat from the Fourth Amendment requirement of an objective standard of reasonableness, subject to judicial review, to which this Court has steadfastly adhered.

The State argues that based on a compelling governmental interest in officer safety, this Court should adopt a per se rule permitting the police to automatically demand that all passengers exit a validly stopped vehicle, even when there is no reasonable articulable suspicion as to the passenger. The State argues: "During the time taken to analyze the legal ramifications of their conduct, officers could be overpowered, injured or killed." Pet. Brief at 21.

The possibility that officers could be "overpowered, injured, or killed" is at least as real, if not more real, in many other Fourth Amendment encounters. However, this Court has not repealed the Fourth Amendment. Instead, this Court has held that the governmental interest in officer safety is only sufficiently compelling to justify a Fourth Amendment intrusion when there is reasonable suspicion as to the particular individual. Police officers face risks everyday, and if this Court were to hold that this risk outweighs the

resulting intrusion on the privacy and security of the persons so detained, there would be no need for the Fourth Amendment, and such a decision would, in effect, overrule *Terry* and its progeny.

Both the State and the United States argue that officer safety should permit the police to automatically demand that all passengers exit validly stopped vehicles. They cite statistics that of the 587,474 officers assaulted between 1985 and 1994, 10.5% were assaulted while conducting traffic stops and pursuits, and of the 708 officer feloniously killed between 1985 and 1994, 13.7% were killed while conducting traffic stops and pursuits. U.S. Brief at 8-9. In 1994, 5,762 officers were assaulted, Pet. Brief at 18 n.8, and 11 officers were feloniously killed. Federal Bureau of Investigation, U.S. Dept. of Justice, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted* 33 (1994). These statistics give the appearance that when an officer makes a traffic stop, the officer has a disproportionately high risk of injury. That is incorrect.

The only reason that 10.5% of police assaults arise from traffic stops and pursuits is that traffic stops and pursuits are probably, by far, the most frequent type of encounter between the police and the public. From July 1, 1994, through June 30, 1995, there were 1,088,982 criminal misdemeanor traffic court cases filed in the District Court of Maryland. Annual Report of the Maryland Judiciary 80 (1994-1995). This probably means at least one million tarffic stops annually in the State of Maryland alone. Although some defendants have multiple traffic violations arising from one incident, the judiciary's one million plus cases do not include those stops that resulted in only verbal warnings and reprimands, in written warnings, in safety violation orders, and in other encounters not resulting in a

traffic court case.

In 1993, Maryland had 3,274,392 of the nation's 173,149,313 licensed drivers. Our Nation's Highways at 44. If Maryland had 1.89% of the nation's licensed drivers, presumably Maryland had approximately 1.89% of the traffic stops. If so, the annual number of traffic stops nationwide approximates 50 million. If, when considering the typical range of zero to four passengers per vehicle, the average is 0.5 passengers per stopped vehicle, there are approximately 25 million passengers each year who are in vehicles in which the driver is stopped. This means that one out of every 10,000 (.0001) traffic stops results in an officer being assaulted, and two out of every 10 million (.0000002) traffic stops results in an officer being killed. Although these numbers are, of necessity, inexact, they perhaps demonstrate why approximately 10 officers are killed annually, throughout our nation, during traffic stops and pursuits. It is not because traffic stops are inherently dangerous -- or at least no more dangerous than many other types of citizen-police encounters. Rather, it is because traffic stops constitute, by far, the most frequent encounter between the police and the public.

Although officer safety is a valid concern, it does not justify giving officers unfettered discretion to seize a passenger with no particularized suspicion. The risk to an officer's safety is not, without more, heightened by the mere presence of a passenger in a car that has been stopped for a traffic violation. In 1994, of the 76 officers feloniously killed, 11 officers were killed during traffic pursuits or traffic stops. *Law Enforcement Officers Killed and Assaulted* 33 (1994). An analysis of the Summaries of Felonious Incidents reveals that of those 11 officers killed, only one was killed by a passenger during a routine traffic stop. *Id.* at

43-60. Furthermore, the number of officers reported killed by passengers, from 1984 through 1994, was only 7.[7]

> This is not the only dangerous era this Court has known. The Court that decided *Carroll v. United States*, sat during a period in our history when the Nation was confronted with a law enforcement problem of no small magnitude--the enforcement of the Prohibition laws. But that Court resisted the pressure of official expedience against the guarantee of the Fourth Amendment.

Almeida-Sanchez v. United States, 413 U.S. 266, 274 (1973). The test has been -- and should remain -- a "balance between . . . the neutralization of danger to the policeman in the investigative circumstance and the sanctity of the individual." *Terry*, 392 U.S. at 26. There is danger in police work. However, that does not justify a repeal of the Fourth Amendment.

3. Even if officer safety were sufficient justification for (1) overruling the requirement of reasonable suspicion, and (2) eliminating judicial review as a check on police discretion, extending *Mimms* to passengers will not accomplish the desired goal. There is no evidence to indicate that a rule providing unfettered discretion to the police will enhance officer safety.

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[7]An additional fifteen officers were killed by unknown assailants, and four were killed in assaults attributed to a combined driver-passenger effort. Federal Bureau of Investigation, U.S. Dept. of Justice, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted* (1984-94).

The State argues that extending *Mimms* to passengers would increase officer safety. There is no evidence to indicate that a rule providing unfettered discretion to the police would enhance officer safety. As the statistics cited by the National Association of Police Organizations demonstrate, the number of police killed during traffic stops has remained quite constant, both before and after this Court's holding in *Mimms*. NAPO Brief at 6. Apparently, requiring drivers to exit the vehicle, during routine traffic stops, has had minimal impact, and it certainly provides no evidence for extending *Mimms* to passengers. *See Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted.*

Even if officer safety were sufficient to justify overruling the requirement of reasonable suspicion and eliminating the requirement of judicial review as a check on police discretion, extending *Mimms* to passengers will not accomplish the desired goal. There is no evidence that allowing officers, absent reasonable suspicion that a passenger poses a threat, to require a passenger to exit a vehicle will further the government interest in officer safety. There is no evidence that the police are more or less safe in jurisdictions that have or have not extended *Mimms* to passengers. Accordingly, this Court should preserve the requirement of reasonable suspicion because its elimination will not enhance officer safety.

Moreover, if threat to officer safety is at issue, such as to justify requiring passengers to exit, then officer safety cannot be accomplished simply by requiring the passenger to exit the vehicle. If passengers do pose a per se threat to the police, then the police need to conduct a frisk of every passenger and/or to conduct a search of the interior of every vehicle. Otherwise, the officer will remain in danger while

the passenger remains outside the vehicle.

Thus, if *Mimms* should be extended to passengers, on a per se basis, then this Court also would have to extend *Terry*, to the 25 million passengers, on a per se basis, permitting a frisk of every one of them, and this Court would also have to extend *Long* to every vehicle in which the 25 million passengers ride, on a per se basis, permitting a search of every one of them.

Because the needed result cannot be accomplished simply by requiring the passenger to exit the vehicle, unless the police also frisk the passenger and search the vehicle, there is no justification for requiring the passenger to exit the vehicle. Moreover, if passengers do pose a threat to officer safety, the officer, by ordering the passenger to exit the vehicle, increases the danger, by providing to the former passenger an even greater freedom to maneuver and cause harm.

D. No Fourth Amendment issue could be less appropriate for the adoption of a bright-line rule than the issue now before this Court. The State's proposed rule would "draw the line" in such a way as to extend unfettered discretion to the police, and thus insulate police conduct from judicial review. Moreover, by applying a bright-line rule in the context of the most frequent of all citizen-police encounters, this Court would be deeming an almost limitless variety of situations to be constitutionally indistinguishable.

This Court has recognized the need to provide guidance to both the police and lower courts, while, at the same time, maintaining the necessary flexibility through a case-by-case determination of the reasonableness of particular police

practices. In this context, the Court has acknowledged that per se rules, with precise boundaries, applicable to all situations, regardless of the factual variations, are not appropriate in many Fourth Amendment contexts.

In some cases, this Court has set forth strict rules or standardized procedures. *See, e.g., New York v. Belton*, 453 U.S. 454 (1981); *Summers*, 452 U.S. 692; *Dunaway*, 442 U.S. 200; *Robinson v. United States*, 414 U.S. 218 (1973). In other cases, this Court has established a flexible reasonableness balancing analysis. *See, e.g, Terry*, 392 U.S. 1; *Michigan v. Thomas*, 458 U.S. 259 (1982); *United States v. Ross*, 456 U.S. 798 (1982); *South Dakota v. Opperman*, 428 U.S. 364 (1976); *Cardwell*, 417 U.S. 583; *Cady v. Dombrowski*, 413 U.S. 433 (1973); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Chambers v. Maroney*, 399 U.S. 42 (1970); *Prouse*, 440 U.S. 648; *Brignoni-Ponce*, 422 U.S. 873; *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Ortiz*, 422 U.S. 891(1975).

All of the cases in which this Court has established bright-line rules in Fourth Amendment scenarios are distinguishable from the instant case. In *Robinson*, and *Belton*, the defendants were lawfully arrested before the Fourth Amendment intrusion took place. In *Summers*, the initial intrusion was based on a valid search warrant. Because the probable cause standard was satisfied, this Court held that no additional justification was required for a per se rule. On the other side, in *Dunaway*, this Court established a bright-line rule to protect citizens, holding that custodial interrogation requires probable cause. In so doing, this Court did not abandon, but actually employed, a balancing test, stating that "the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that

seizures are 'reasonable' only if supported by probable cause." 442 U.S. at 214.

In this case, there was no warrant, no probable cause to arrest, no probable cause to search, no reasonable suspicion that the driver posed a threat, no reasonable suspicion that the passenger posed a threat, and no reasonable suspicion that the passenger was involved in wrongdoing. There was nothing more than a traffic violation, for speeding, on the part of the driver. There is no precedent of this Court, and no logical reason, to establish a bright-line rule, in this case, permitting officers to automatically demand that passengers exit vehicles, when the police lack reasonable suspicion as to the passenger. A *Mimms* extension to passengers would not be a bright-line rule that could safeguard both the Fourth Amendment rights of citizens and the safety of officers.

Even Professor LaFave, whose support for bright-line rules was quoted by this Court in *Belton*, has recognized that bright-line rules are not appropriate for all Fourth Amendment scenarios. Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing 'Bright Lines' and 'Good Faith,'* 43 U. Pitt. L. Rev. 307, 323 (1982). To determine when a bright-line rule is appropriate, Professor LaFave poses the following questions: (1) Does the rule have clear and certain boundaries, so that it makes case-by-case evaluation and adjudication unnecessary? (2) Does the rule produce results approximating those that would be obtained if accurate case-by-case application of the underlying principle were practicable? (3) Is the rule responsive to a genuine need to forego case-by-case application of a principle because that approach has proved unworkable? (4) Is the rule not readily susceptible to manipulation and abuse? *Id.* at 325.

In this case, the answer to each question is "no." On first

blush, the State's proposed bright-line rule appears to have clear and certain boundaries, making case-by-case evaluation unnecessary. However, such a rule is not so clear or certain as it first appears. Unlike the lone driver, there may be no passengers, one passenger, or multiple passengers, ranging in number from zero to six in most vehicles, and many more in vans and buses. Which passengers would the police be allowed to require to exit the vehicle? The front seat passenger? The front seat and the back seat passengers? All passengers in an automobile? All 60 passengers on a bus? Can the police order all passengers to exit the vehicle during the day, or only at night when the officer's ability to see activity inside the vehicle is hindered?

Furthermore, passengers are different than drivers, and passengers are different than each other. The driver always has a possessory interest in the vehicle, always has essentially the same degree of control over the vehicle, and always has essentially the same reasonable expectation of privacy. This is not so with passengers. Some passengers own the vehicle, and some are mere hitchhikers. Some passengers are 100 years old, and some are 100 hours old. Although some passengers are sitting next to the driver, awake, reading the map, and giving directions, others are asleep under the covers in the back of a mobile home or comatose in the back of an ambulance. Would the Court mean to create a bright-line rule to permit the police to require infants with pneumonia, or elderly persons, or the profoundly retarded, or the severely handicapped passengers, who pose no apparent threat to officer safety, to exit the vehicle, in the pouring rain, late at night?

In reality, the police will probably only be requiring passengers to exit vehicles when the police either believe there is an issue of officer safety, or when the police are

abusing the power that comes with a per se rule by "fishing" for evidence. In the former scenario, like in this case, the suppression judge, as fact finder on the suppression motion, can resolve the issue, on a case-by-case basis, like the majority of Fourth Amendment issues. In the latter scenario, the law needs a mechanism to review police conduct. Neither the police, nor the courts, need a per se rule, particularly if that rule means that Fourth Amendment rights may be unconstitutionally trampled, without a means of judicial redress, by such a per se rule.

With regard to Professor LaFave's second and third inquiries, a bright-line rule in this situation would not produce results approximating those that would be obtained in an accurate case-by-case analysis. Individual officers, based on individual assessment, of individual situations, are in the best position to determine when their safety is threatened. If an officer has reasonable suspicion of a threat to officer safety, that officer, in that situation, may order the passenger to exit the vehicle, regardless of whether a bright-line exists. The officer would be able to articulate the individualized suspicion that caused that officer to require the passenger to exit the vehicle.

Under a case-by-case evaluation, which is performed every day by the police, some situations lead to an order to exit the vehicle, but most do not. Of those situations in which passengers are required to exit the vehicle, some situations lead to evidence being obtained, but most do not. Of those situations in which evidence is obtained, some situations lead to criminal charges, with an eventual trial and/or plea bargain, with a fully litigated suppression hearing, but most do not. Of those suppression motions actually litigated, probably the vast majority result in the suppression judge being persuaded by the officer's

articulation of a reasonable suspicion of a threat to officer safety, and the evidence is admitted. This case presents what is probably the rare scenario, in which evidence is suppressed, because the fact finding judge was not persuaded that the officer, at the time of the intrusion, had a reasonable suspicion of a threat to officer safety.

The State's response is to seek a per se rule to insulate the conduct of the police from judicial review. Judicial review should be recognized as working just as well in the small minority of situations in which evidence is suppressed as it does in the vast majority of situations in which evidence is admitted. Moreover, new bright-line rules should not be drawn when the existing doctrine is not causing serious problems in day-to-day practice. Accordingly, there is no demonstrated need to forego the current case-by-case analysis.

Finally, addressing Professor LaFave's fourth question, a bright-line rule in this situation is subject to manipulation and abuse. As Justice Stevens noted in his dissent in *Mimms*, "to eliminate any requirement that an officer be able to explain the reasons for his actions . . . leaves police discretion utterly without limits. . . . Some citizens will be subjected to this minor indignity while others--perhaps those with more expensive cars, or different bumper stickers, or different colored skin--may escape it entirely." 434 U.S. at 122. This unfettered discretion would apply to passengers as well.

In addition, bright-line Fourth Amendment rules may fail in their mission of simplifying the administration of justice for essentially two reasons. Albert W. Alschuler, *Bright Line Fever and The Fourth Amendment*, 45 U. Pitt. L. Rev. 227, 231 (1984). First, establishing a specific rule for every possible Fourth Amendment encounter between the police

and citizens will inevitably result in the creation of so many rules that the police will not be able to remember or properly apply such rules. *Id.* Second, due to the diversity of the types of encounters between the police and citizens, bright-line rules are ineffective due to their rigidity. *Id. See* Terence C. Gill, Note, *Regulating the Police in Investigatory Stops: A Practical Alternative to Bright Line Rules*, 59 S. Cal. L. Rev. 183 (1985); Gerald G. Ashdown, *Good Faith, The Exclusionary Remedy, and Rule-Oriented Adjudication in the Criminal Process*, 24 Wm. & Mary L. Rev. 335 (1983).

When the appropriate blend of law and discretion cannot be determined "in the large," as in the instant case, the issue must be resolved "in the specific," by examining the facts and circumstances of a particular rule. Alschuler, *supra* at 227. Case-by-case adjudication, as to passengers, provides the balance necessary to ensure officer safety and to protect against Fourth Amendment violations. If the bright-line rule, as urged by the State, were to be adopted, on this issue, injustice would most often result. Countless individuals would needlessly have their Fourth Amendment protections violated. This degree of injustice far outweighs any benefit of such a rule. A bright-line *Mimms* rule for passengers would subject millions of passengers to arbitrary and unjustified intrusions, with no avenue of redress, in a well-intended, but unsuccessful, attempt to lessen the potential danger to officers making traffic stops.

"[T]he quest for clear rules must proceed with caution if reasonable and predictable results are in fact to be obtained." LaFave, *supra* at 333. "[A]s Justice Rehnquist has noted: 'Our entire profession is trained to attack 'bright lines' the way hounds attack foxes. Acceptance by the courts of arguments that one thing is the 'functional equivalent' of the

other, for example, soon breaks down what might have been a bright line into a blurry impressionistic pattern.'" *Id.* at 333. (citing *Robbins v. California*, 453 U.S. 420 (1981) (Rehnquist, J., (now C.J.), dissenting)).

This Court has produced significant Fourth Amendment precedent, both in the automobile context and in the reasonable suspicion context, to provide guidance to both the police and the courts. Moreover, the appellate process "tends to unify precedent and will come closer to providing law enforcement officers with a defined 'set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.'" *Ornelas v. United States*, 116 S. Ct. 1657, 1662 (1996). Accordingly, this Court should reject the State's proposed bright-line rule.

E. Because Trooper Hughes was not constitutionally entitled to automatically require Wilson to exit the vehicle, the evidence seized was a fruit of the poisonous tree. Accordingly, the trial court correctly ruled that the evidence must be suppressed, and the appellate court correctly affirmed the judgment of the trial court.

When Trooper Hughes ordered Wilson out of the vehicle, he did so without reasonable suspicion, as required under *Terry* and its progeny. Therefore, the evidence obtained, pursuant to an illegal seizure, should be suppressed, as a fruit of the poisonous tree.

CONCLUSION

For the foregoing reasons, Respondent Jerry Lee Wilson respectfully urges this Court to affirm the judgment of the Court of Special Appeals of Maryland.

Respectfully submitted,

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No. 95-1268

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF MARYLAND,
Petitioner,

v.

JERRY LEE WILSON,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

REPLY BRIEF FOR PETITIONER

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REPLY ARGUMENT

1. The order to respondent Wilson to alight from the car occurred during a lawful traffic stop. He concedes as much (Resp. Br. 17) but contends that the order violated the Fourth Amendment because it was unaccompanied by any suspicion of wrongdoing on his part. Because the order came as a mere incident to the traffic stop, it was reasonable in light of the officer's need to complete the stop safely. Indeed, this incidental intrusion was no different from that approved in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), and the other cases catalogued in Maryland's opening brief. (Pet. Br. 22 & n.11).

One such case is *Michigan v. Summers*, 452 U.S. 692 (1981). Wilson takes issue with Maryland's reliance on *Summers* because, in that case, there was a warrant to search the house. (Resp. Br. 28). The relevance of *Summers* to this case, however, is its premise that once the police have undertaken a valid search or seizure, they may automatically take limited protective steps to safely effectuate that Fourth Amendment event. That principle applied here means that the initiation of a lawful traffic stop authorizes an officer, without further justification, to order all occupants to exit the vehicle.

Thus, contrary to Wilson's assertion (Resp. Br. 31), it is unnecessary to "transfer" to the passenger the suspicion that focused upon the driver by virtue of the traffic infraction. This Court did not require any suspicion of danger or wrongdoing on the driver's part to justify the exit order in *Mimms*, 434 U.S. at 109-11, and no suspicion is needed here. Instead, the order is justified by the potential danger to the police officer in approaching

persons seated in a vehicle, whether they are drivers or passengers.

2. Because of the reasonableness of an order controlling the movement of occupants as an incident to a traffic stop, Wilson engages in hyperbole by asserting that such authority would "unconstitutionally extend unfettered discretion" to the police to "engage in fishing expeditions for evidence." (Resp. Br. 32, 35). This case does not present a situation in which police seek permission to stop vehicles merely because they contain passengers. *Cf. Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (police cannot randomly stop vehicles on the highway without any suspicion of wrongdoing). Nor was the officer here seeking to gather evidence of the passengers' criminality once the car was stopped. Rather, the officer simply took a minimal step to control the movements of the car's occupants during the course of a lawful stop of the vehicle. That any further intrusion must be justified by particularized suspicion highlights the reasonableness of giving police officers this limited authority. *See* Brief for the United States as Amicus Curiae 14 n.3.

3. Wilson's contention that officers will unreasonably and selectively enforce the law (Resp. Br. 32-36) is also without merit. As this Court recently explained in *Whren v. United States*, 116 S. Ct. 1769, 1774 (1996), an officer's subjective intent does not invalidate "objectively justifiable behavior under the Fourth Amendment." Moreover, and contrary to Wilson's assertions, a mechanism does exist for judicial review of a particular officer's abusive exercise of authority. *See id.* (objection to intentionally discriminatory application of laws is made pursuant to Equal Protection Clause); *cf. United States v. Armstrong*, 116 S. Ct. 1480, 1486 (1996) (selective

prosecution claim alleges denial of equal protection of the law). In short, the mere potential for selective enforcement does not render an entire rubric of police conduct unreasonable under the Fourth Amendment.

4. Wilson's argument that traffic stops are not inherently dangerous (Resp. Br. 37-38) is simply wrong. As discussed at page 17 of Maryland's opening brief, this Court has already recognized the inherent danger of traffic stops. Indeed, the danger presented by traffic stops was the primary basis for allowing the exit order in *Mimms*. 434 U.S. at 110. Moreover, the statistics set forth in the amicus briefs confirm that traffic stops are dangerous for police officers. *See* Brief for the United States as Amicus Curiae 8-10; Brief for National Association of Police Organizations, Inc. as Amicus Curiae 4-8; Brief for State of Ohio et al. as Amici Curiae 5-6; Brief for Americans for Effective Law Enforcement, Inc. et al. as Amici Curiae 7-8; Brief for the Criminal Justice Legal Foundation as Amicus Curiae 18.

Wilson discounts these statistics, arguing that traffic stops result in a high number of injuries to officers merely because "traffic stops constitute, by far, the most frequent encounter between the police and the public." (Resp. Br. 38). The fact remains that over 5,000 police officers are assaulted each year during the course of so-called "routine" traffic stops. But for the fact that police in the majority of jurisdictions have been authorized to control all occupants, and not just the driver (Pet. Br. 8 n.2), the figure would doubtless be much higher.

5. Upholding the constitutional validity of Trooper Hughes's conduct as a reasonable intrusion on the passenger's liberty hardly represents "a repeal of the Fourth Amendment." (Resp. Br. 39). This intrusion, as in

Mimms, is a necessary incident of the traffic stop to allow officers to protect themselves from potentially lethal danger. Allowing the officer to take limited measures to control the movements of *all* occupants, for the sole purpose of ensuring the officer's safety, is reasonable under the Fourth Amendment.

CONCLUSION

For the foregoing reasons and those stated in the State of Maryland's opening brief, the judgment of the Court of Special Appeals of Maryland should be reversed.

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No. 95-1268

In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF MARYLAND, PETITIONER

v.

JERRY LEE WILSON

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a police officer who has made a lawful traffic stop of a vehicle may order a passenger to get out of the vehicle without any particularized suspicion.

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ON WRIT OF CERTIORARI
TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether a police officer who has made a lawful traffic stop of a motor vehicle may order a passenger to get out of the vehicle without violating the passenger's rights under the Fourth Amendment. The Court's resolution of this question is likely to affect the admissibility of evidence in federal criminal prosecutions. In addition, federal law enforcement officers routinely stop motor vehicles, and the conduct of those officers will be governed by the Court's ruling in this case. Accordingly, the United States has an interest in the proper resolution of the question presented.

STATEMENT

1. On June 8, 1994, Maryland State Police Trooper David Hughes stopped a Nissan Maxima for speeding on Interstate 95 in Baltimore, Maryland. The car had three occupants. As Trooper Hughes approached the car, the driver, Terrence McNichol, got out of the car. At the officer's request, McNichol produced his driver's license and told Trooper Hughes that rental documents for the Nissan were in the car. Trooper Hughes requested that McNichol return to the car to retrieve the documents. After McNichol reentered the car, Trooper Hughes directed respondent, who was sitting in the front passenger seat of the car, to get out of the car and to step back toward the police car. Trooper Hughes, who had observed some furtive movements in the car by its two passengers before the stop, wished to speak with each individual in the car one at a time. As respondent got out of the car, crack cocaine fell from his right front pants leg to the ground. Trooper Hughes then placed respondent under arrest. Pet. App. 2a-3a, 33a-34a; J.A. 7-17, 23-26, 31-32, 35-37.

2. Respondent was charged with possession of cocaine with intent to distribute and related offenses. Pet. App. 1a. He moved to suppress the evidence seized at the time of his arrest, arguing that Trooper Hughes had violated the Fourth Amendment by ordering him to get out of the car. The trial court granted the motion to suppress. Pet. App. 33a-35a. Distinguishing this Court's decision in *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977) (per curiam), in which the Court held that an officer who makes a valid traffic stop may order the driver to get out of the vehicle, the trial court ruled that an officer making a

traffic stop may order a passenger out of the vehicle only if he has reasonable suspicion that the passenger poses a threat to his safety. Pet. App. 34a-35a. In this case, the court found that Trooper Hughes "could not have had a reasonable suspicion that [respondent] was armed and dangerous" because he allowed McNichol to return to the car to retrieve the rental documents. *Id.* at 35a.

3. The Court of Special Appeals affirmed. Pet. App. 1a-32a. The court concluded that the reasons given in *Mimms* for having the driver exit a vehicle stopped for a traffic violation did not justify a similar intrusion into the Fourth Amendment rights of the passenger. Pet. App. 16a-25a. The court acknowledged that the *Mimms* rule was based on the "heavy * * * societal interest" in "minimizing the risk of harm to an officer from an armed and dangerous driver," *id.* at 17a, and that the "societal interest is just as great when considering protecting an officer from a passenger as it is when protecting an officer from a driver." *Id.* at 18a. The court concluded, however, that "a police intrusion on the Fourth Amendment interest of the passenger is not so minimal or merely incremental as to be of no more than slight significance in the weighing operation." *Id.* at 20a.

The Court of Special Appeals explained that when a vehicle is lawfully stopped, the driver "is subject to further detention," is required to produce a driver's license and vehicle registration, and may be "subject to receiving a traffic ticket or citation, if not, indeed, to custodial arrest for the infraction." Pet. App. 19a. In contrast, the court stated, "[o]nce the automobile has slowed down sufficiently for the passenger safely to alight, * * * the passenger is subject to no mandatory detention whatsoever. The passenger is

presumptively free to abandon the driver to the clutches of the law and to hail a cab." *Id.* at 20a. Moreover, "a traffic stop *per se* does not, without more, focus suspicion on a passenger as either a wrongdoer or as a possible source of danger to the officer." *Id.* at 23a. The court concluded that an officer's prerogative to order a passenger out of a stopped vehicle "is not automatic, but requires, for justification, some individualized or particularized suspicion." *Id.* at 25a-26a.

The Court of Appeals of Maryland denied certiorari. Pet. App. 37a.

SUMMARY OF ARGUMENT

In *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977) (per curiam), this Court held that a police officer who stops a vehicle for a traffic violation may order the driver to get out of the vehicle without running afoul of the Fourth Amendment's reasonableness requirement. The Court reasoned that the "legitimate and weighty" interest in the safety of an officer conducting a traffic stop outweighs the "*de minimis*" intrusion resulting from the officer's request to get out of the vehicle, such that no particularized suspicion is required to justify the officer's action. 434 U.S. at 108, 110-111. That analysis applies to an officer's order to a passenger to exit as well.

The interest that the *Mimms* rule promotes—protection of the officer's safety during a traffic stop—is especially weighty. The threat to officers making traffic stops is varied and unpredictable. Recent statistics show that more than 5,000 assaults on law enforcement officers occur each year during traffic stops, and that as many as 13.7% of all felonious killings of law enforcement officers occur during traffic

stops and pursuits. The potential unknown danger to an officer is no less great when [illegible]sed by a passenger than a driver. Indeed, the officer's interest in his security is heightened when a stopped vehicle has multiple occupants and the officer's attention is focused principally on the driver. To ensure that a routine encounter does not unexpectedly escalate into a confrontation, the officer must have the latitude to order both the passenger and the driver out of the car.

The passenger's privacy interest in choosing to remain in the vehicle during the stop does not outweigh those safety interests. This Court's decisions have long noted the reduced expectation of privacy held by persons traveling by automobile, both because of the public nature of that activity as well as the extent of public regulation of vehicles. It is thus neither unusual nor greatly intrusive for a passenger to be in a vehicle that is subject to a traffic stop. Ordering the passenger briefly to exit the vehicle represents only a small additional intrusion on the passenger's privacy during the stop. An officer may constitutionally examine a passenger from outside the vehicle, shine a flashlight on the passenger, and touch the passenger if necessary to secure a visible weapon. As with the driver, the incremental intrusion into the passenger's Fourth Amendment rights resulting from the officer's order to get out of the car is *de minimis*.

The Court of Special Appeals erroneously imposed a requirement that officers have a particularized sense of "heightened caution" before being permitted to order a passenger out of a vehicle. The court below reasoned that a passenger is presumptively free to abandon the driver who is subject to a traffic stop and that an order to exit is therefore significantly more

intrusive for the passenger than for the driver. Both driver and passenger, however, are subject to a Fourth Amendment seizure when the vehicle is stopped; the additional intrusion resulting from a direction to exit the vehicle is *de minimis* as to both. Nor did *Mimms* rest on an assumption that the driver poses a threat to the officer because of the driver's commission of a traffic violation. Rather, the *Mimms* rule responds to the inherent "risk confronting an officer as he approaches a person" in the stopped vehicle, 434 U.S. at 110, a risk presented by the passenger as well as the driver. Finally, a "heightened caution" requirement would also create unnecessary confusion over the circumstances in which officers may reasonably ask a passenger to step out of a lawfully stopped vehicle.

ARGUMENT

A POLICE OFFICER MAY, CONSISTENT WITH THE FOURTH AMENDMENT, ROUTINELY ORDER A PASSENGER TO EXIT A VEHICLE DURING A LAWFUL TRAFFIC STOP

"The fundamental command of the Fourth Amendment is that searches and seizures be reasonable." *New Jersey* v. *T.L.O.*, 469 U.S. 325, 340 (1985); see *Pennsylvania* v. *Mimms*, 434 U.S. 106, 108-109 (1977) (per curiam) ("The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'") (quoting *Terry* v. *Ohio*, 392 U.S. 1, 19 (1968)). This Court judges the reasonableness of a particular law enforcement practice by "'balancing its intrusion on the individual's Fourth Amendment interests against

its promotion of legitimate interests.'" *Vernonia Sch. Dist. 47J* v. *Acton*, 115 S. Ct. 2386, 2390 (1995) (quoting *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989)) (internal quotation marks omitted); see *Pennsylvania* v. *Mimms*, 434 U.S. at 109.

Applying that test, the Court held in *Pennsylvania* v. *Mimms* that "once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures." 434 U.S. at 111 n.6. Recognizing "the inordinate risk confronting an officer as he approaches a person seated in an automobile," the Court found the interest promoted by the order to the driver to get out of the vehicle—preservation of the officer's safety—to be "both legitimate and weighty." *Id.* at 110. Against that interest, the Court weighed the "incremental intrusion resulting from the request to get out of the car once the vehicle was lawfully stopped." *Id.* at 109. Observing that "this additional intrusion can only be described as *de minimis*," the Court concluded that "[w]hat is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety." *Id.* at 111 (footnote omitted). Thus, the Court held that an officer's order for a driver to get out of a stopped vehicle is not an unreasonable interference with the driver's Fourth Amendment rights, even in the absence of any "reason to suspect foul play from the particular driver at the time of the stop." 434 U.S. at 109.

The balance struck by this Court in *Mimms* applies here as well. The societal interest in allowing an officer conducting a traffic stop to take reasonable

steps to ensure his own safety is plainly "both legitimate and weighty," 434 U.S. at 110, and it outweighs the passenger's *de minimis* privacy interest in remaining in the vehicle during the duration of the stop.

A. The Safety Interests Of Officers Making Lawful Traffic Stops Are Legitimate and Weighty

1. This Court has frequently noted that traffic stops are "especially fraught with danger to police officers," *Michigan* v. *Long*, 463 U.S. 1032, 1047 (1983), and that assaults on officers frequently occur during such stops. See *United States* v. *Robinson*, 414 U.S. 218, 234 n.5 (1973) ("a significant percentage of murders of police officers occurs when the officers are making traffic stops"); *Adams* v. *Williams*, 407 U.S. 143, 148 n.3 (1972). Indeed, in *Mimms*, the Court noted the "inordinate risk confronting an officer as he approaches a person seated in an automobile" and "expressly declined to accept the argument that traffic violations necessarily involve less danger to officers than other types of confrontations." 434 U.S. at 110.

2. The Court's concern for officer safety during traffic stops is well justified by the findings of recent studies. These studies show not only the direct threat to officers, but also the varied circumstances in which a seemingly routine stop can become a threatening confrontation. Between 1985 and 1994, for example, 13.7% of the 708 officers feloniously killed in the line of duty (97) were slain during traffic stops and pursuits. U.S. Dep't of Justice Federal Bureau of Investigation, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted*

1994 (*Uniform Crime Report*) at 30-31.[1] Of the 587,474 officers assaulted between 1985 and 1994, 10.5% were victimized during traffic stops and pursuits (an average of more than 5,000 assaults per year). *Ibid.*

The circumstances in which officers face safety risks when making traffic stops vary greatly. Perhaps not surprisingly, a significant portion of all assaults of officers during traffic stops occurs when the officer is alone—1,931 of the 5,762 such assaults in 1994. *Uniform Crime Report* 72. The threat created in that situation runs a broad spectrum, with 68.3 percent of the assaults involving the use of hands, legs, and the like, 4.8% firearms, .9% knives or other cutting instruments, and 26% other dangerous weapons. *Id.* at 71.

Assailants who wield firearms, and thereby pose the greatest risk, carry them in vehicles in a variety of ways. In a study by the Federal Bureau of Investigation, 34% of the offenders stated that they carried their weapons on their person while in a vehicle, 20% kept their weapons below their seat, and 12% left them on the seat. U.S. Dep't of Justice Federal Bureau of Investigation, *Killed in the Line of Duty: A Study of Felonious Killings of Law Enforcement Officers* 12 (Sept. 1992) (*FBI Study*). These variations confirm common sense—that a potential assailant has a range of options in a vehicle to secrete or store a weapon that might be used to

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[1] These figures are not significantly different for the period 1981-1990, during which 96 officers were killed while making traffic stops. See U.S. Dep't of Justice Federal Bureau of Investigation, *Killed in the Line of Duty: A Study of Felonious Killings of Law Enforcement Officers* 40 (Sept. 1992).

attack an officer during a stop. And statistics suggest that neither training nor experience enables officers to avoid all such violent encounters. Between 1981 and 1990, victim officers killed had an average of nine years of law enforcement service; only five percent had less than one year of service. See *FBI Study* 31.

One way for the officer to try to neutralize a situation, before an occupant of the vehicle can surprise the officer with a weapon, is to have the occupant get out of the vehicle. Other officers may gain a greater sense of security in particular situations by having the passenger or passengers remain in the car.[2] A law enforcement technique need not be applicable in all situations to be valid under the Fourth Amendment. Indeed, while the Court has noted that "[k]eeping the driver of a vehicle in the car during a routine traffic stop is probably the typical practice," police "officers may, consistent with the Fourth Amendment, exercise their discretion to require a driver who commits a traffic violation to exit the vehicle even though they lack any particularized reason for believing the driver possesses a weapon." *New York* v. *Class*, 475 U.S. 106, 115 (1986) (citing *Mimms*).

3. The Court of Special Appeals acknowledged (Pet. App. 18a) that "it is self-evident that an armed and dangerous passenger poses just as great a threat

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[2] See David H. Bayley, "The Tactical Choices of Police Patrol Officers," *in* 5 *Police and Law Enforcement* 83 (Daniel B. Kennedy & Robert J. Homant eds. 1987) (describing varied patterns of whether vehicle occupants are ordered to exit or to stay in a vehicle, and noting that "patrol officers face distinctly different tactical choices at different stages of an encounter").

to an officer as does an armed and dangerous driver" and that therefore "the societal interest is just as great when considering protecting an officer from a passenger as it is when protecting an officer from a driver." Indeed, the danger facing a police officer during a traffic stop may be more substantial when the driver is not the only occupant of the stopped vehicle. An officer conducting a traffic stop ordinarily focuses on the driver and cannot keep a close watch on a passenger inside the vehicle. Authorizing the officer to order the passenger from the car allows the officer to keep the passenger in view. See *Ruvalcaba* v. *City of Los Angeles*, 64 F.3d 1323, 1327 (9th Cir. 1995) ("Having all occupants step out of the vehicle protects the safety of the officer while the officer is dealing with the driver regarding the traffic violation."), cert. denied, 116 S. Ct. 1841 (1996). It also prevents the passenger from gaining access to weapons in the vehicle. A gun in a car that is available to a driver would, in many circumstances, also be within reach of a passenger. See *FBI Study* 12. And not only is a passenger just as capable as a driver of inflicting harm on a law enforcement officer, there is no sound reason to think that a passenger's motivation would be any different from a driver's during a lawful traffic stop. A passenger engaged in criminal activity would feel just as threatened by the arrival of a law enforcement officer on the scene as a driver with criminal designs. In short, the potential threat from a passenger does not differ from the one posed by a driver.

B. The Intrusion Caused By A Police Officer's Request That A Passenger Exit A Lawfully Stopped Vehicle Is *De Minimis* And Does Not Outweigh The Safety Interests Of The Officer Making The Stop

1. This Court has long noted that a person traveling in an automobile has a reduced expectation of privacy, because the vehicle "seldom serves as one's residence or as the repository of personal effects" and "travels public thoroughfares where both its occupants and its contents are in plain view." *New York* v. *Class*, 475 U.S. 106, 112-113 (1986) (quoting *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion)). Consequently, a car and its occupants have "little capacity for escaping public scrutiny." *Class*, 475 U.S. at 113 (quoting *Cardwell*, 417 U.S at 590). The voluntary exposure of one's person to public view necessarily diminishes the legitimate expectations in privacy protected by the Fourth Amendment, as the Court noted in *Katz* v. *United States*, 389 U.S. 347, 351 (1967): "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." A person's reasonable expectation of privacy when traveling by automobile is also diminished by the "pervasive regulation by the State." *Class*, 475 U.S. at 113. Persons in "a motor vehicle must expect that the State, in enforcing its regulations, will intrude to some extent upon that [person's] privacy." *Ibid.*; see *California* v. *Carney*, 471 U.S. 386, 392 (1985) ("The public is fully aware that it is accorded less privacy in its automobiles because of this compelling governmental need for regulation.").

2. Although Fourth Amendment protections extend to automobiles and their occupants, the Court has upheld law enforcement practices directed at

vehicles that necessarily intrude on the interests of passengers in being free from searches and seizures. The stop of the automobile in which the passenger is riding constitutes a "seizure" that interferes with the passenger's interest in reaching a destination without interruption. As this Court has observed, "a traffic stop significantly curtails the 'freedom of action' of the driver and the passengers, if any, of the detained vehicle." *Berkemer* v. *McCarty*, 468 U.S. 420, 436 (1984); see *United States* v. *Hensley*, 469 U.S. 221, 226 (1985) (stop intrudes on "Fourth Amendment interest of the driver and passengers in remaining secure from the intrusion"). Such a stop, however, is lawful if the officer has reasonable suspicion to believe that the driver has committed a crime, see *Hensley*, 469 U.S. at 226, or has probable cause to believe that a traffic offense has occurred, *Whren* v. *United States*, 116 S. Ct. 1769, 1772 (1996).

After stopping a vehicle, an officer may lawfully look inside it and thereby see its occupants. See *Coolidge* v. *New Hampshire*, 403 U.S. 443, 464 (1971). An officer unable to see clearly into the vehicle can move around it to gain a better vantage point from which to look into it. See *Texas* v. *Brown*, 460 U.S. 730, 740 (1983) (plurality opinion of Rehnquist, J.). If the area within the car is unilluminated, the officer may use a flashlight to expose a darkened vehicle and its occupants to light. See *ibid.*; *United States* v. *Dunn*, 480 U.S. 294, 305 (1987); *United States* v. *Lee*, 274 U.S. 559, 563 (1927). These procedures enable the officer to observe and examine a passenger sitting in a vehicle, and do not implicate any protected Fourth Amendment privacy interests. Similarly, an officer may reach into a car and shift a passenger's personal effects if those items obscure from view the vehicle

identification number. See *Class*, 475 U.S. at 114. An officer may also reach into a car to secure a visible weapon held in the waistband of an occupant. See also *Adams* v. *Williams*, 407 U.S. 143 (1972) (officer may search for and seize a weapon upon probable cause).

3. An officer's order to a passenger to get out of a stopped car is only a small additional intrusion. To the extent that the order to exit constitutes a "seizure," it is not significantly more intrusive than the stop of the car itself. And to the extent that the order constitutes a "search," it does not add appreciably to the intrusion on privacy interests that is otherwise authorized as an incident of the stop. Here, for example, there is no doubt that Officer Hughes could have peered into the automobile at respondent, shined a light on him if necessary, and reached into the vehicle to shift any papers respondent may have had on the dashboard or to seize a weapon had the respondent possessed one. Given the availability of those practices, the officer's direction that respondent exit the car constituted, at most, a modest "incremental intrusion" on his privacy. *Class*, 475 U.S. at 121 (Powell, J., concurring). Balanced against the important safety interests at stake, the order was reasonable within the meaning of the Fourth Amendment, even without a showing of particularized suspicion.[3]

[3] If, however, after ordering the passenger to get out of the car, the officer wished to frisk the passenger, that action must be based on objective facts giving rise to reasonable suspicion. See *Terry* v. *Ohio*, 392 U.S. 1 (1968). And the duration of a traffic stop must be reasonably related in scope to its purposes; a further seizure must generally be justified by particularized suspicion. *Berkemer*, 468 U.S. at 439-440; cf. *United States* v. *Sharpe*, 470 U.S. 675 (1985). The existence of these protections

C. The State Court's Requirement Of Particularized Suspicion Is Unsound

The Maryland Court of Special Appeals held that only when a police officer has some quantum of particularized suspicion, such as a "sense of heightened caution," may the officer direct the passenger to get out of the vehicle. Pet. App. 32a. That conclusion is supported neither by the distinctions between a passenger and the driver of a stopped vehicle nor by Fourth Amendment precedents and policies.

1. In distinguishing this case from *Pennsylvania* v. *Mimms*, *supra*, the court below reasoned that the passenger of a vehicle stopped for a traffic violation, unlike the driver, is not subject to personal detention and investigation based on the traffic offense. Accordingly, the court concluded, the direction to the passenger to exit the vehicle is more than a *de minimis* additional intrusion; rather, the court thought, it constitutes "police interference with the presumptively unfettered liberty" of the passenger to leave the scene of the stop. Pet. App. 20a.

That analysis, however, overlooks the Fourth Amendment consequences of the stop itself. As discussed above, when a car is subjected to a lawful traffic stop, the passenger's freedom, as well as the driver's, is restricted. The officer's action in stopping a car constitutes a "seizure" of all of its occupants.[4] *Berkemer*, 468 U.S. at 436. In addition, ac-

underscores the reasonableness of affording the officer discretion to request that the passenger briefly vacate the automobile so that the stop may be completed in a safe manner.

[4] Thus, courts have held that a passenger has standing to move to suppress the fruits of an unlawful traffic stop, even when he lacks standing to challenge the search of the vehicle.

cepted law enforcement techniques permit an officer to peer into the vehicle and to shine a flashlight inside, notwithstanding the possible intrusion on the passenger's privacy expectations. See pp. 13-14, *supra*. Because the passenger, like the driver, "is being asked to expose to view very little more of his person than is already exposed," *Mimms*, 434 U.S. at 111, the "additional intrusion" amounts to, at most, a "mere inconvenience." *Ibid.*

The Court of Special Appeals assumed that, unlike the driver of a vehicle that has been stopped for a traffic violation, a passenger is ordinarily "free to abandon the driver to the clutches of the law and to hail a cab." Pet. App. 20a. An order directing the passenger to get out of the vehicle, however, would not interfere with any privacy interest of a passenger who wishes to leave the scene, for such a passenger must get out of the car, and expose himself to view, in order to do so.[5]

The Court of Special Appeals also erred in concluding (Pet. App. 23a) that the rule announced in *Mimms* should not be extended to passengers because "a traffic stop *per se* does not, without more, focus

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See, *e.g.*, *United States* v. *Kimball*, 25 F.3d 1, 5-6 & n.3 (1st Cir. 1994); *United States* v. *McKneely*, 6 F.3d 1447, 1450 (10th Cir. 1993); *United States* v. *Roberson*, 6 F.3d 1088, 1091 (5th Cir. 1993), cert. denied, 114 S. Ct. 1230, 114 S. Ct. 1322, and 1383 (1994).

[5] ~~Although~~ This case presents no question of when a police officer may detain a passenger at the scene of a traffic stop. The same safety concerns that justify allowing an officer to order a passenger to get out of the stopped vehicle, however, should also afford the officer discretion to direct the passenger to remain within the car or on the scene during the stop without a showing of particularized suspicion.

suspicion on a passenger as either a wrongdoer or as a possible source of danger to the officer." The rule in *Mimms*, however, was not based on the view that the stop of a vehicle establishes the driver's culpability or dangerousness. Rather, the Court in *Mimms* specifically stated that the officer in that case "had no reason to suspect foul play from the particular driver at the time of the stop." 434 U.S. at 109. Indeed, the applicability of the *Mimms* rule does not depend upon the seriousness of the violation warranting the stop; in *Mimms* itself, the defendant was stopped for driving with an expired license plate. *Id.* at 107. The Court nevertheless noted with approval the State's argument that the practice of asking the driver to get out of the car "was adopted as a precautionary measure to afford a degree of protection to the officer and that it may be justified on that ground." *Id.* at 110.[6]

Even if the privacy expectations of a passenger were somehow greater than those of a driver, the

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[6] The Court of Special Appeals stated (Pet. App. 23a) that in *New York* v. *Class*, 475 U.S. 106 (1986), this Court suggested that its decision in *Mimms* rested in part on "the focusing of suspicion of wrongdoing specifically on the driver." This Court held in *Class* that the Fourth Amendment was not violated when an officer who had stopped the defendant's vehicle for a traffic violation reached into the car to move papers that were covering the car's Vehicle Identification Number. 475 U.S. at 119. Although the Court noted in *Class* that the initial stop of the defendant's vehicle in that case, as in *Mimms*, was based on "probable cause focusing suspicion on the individual affected by the search," 475 U.S. at 117-118, the Court also pointed out that *Mimms* held that officers may require a driver stopped for a traffic violation to get out of the vehicle "even though they lack any particularized reason for believing the driver possesses a weapon." *Id.* at 115.

intrusion at issue in this case is still sufficiently minimal as to be outweighed by the officer's safety interests served by asking the passenger to exit the vehicle. Just as an officer at the scene of an accident or crime may ask an innocent bystander to step aside, to leave the area, or otherwise to cooperate in the officer's effort to secure the area, so too is it reasonable for an officer to ask a passenger briefly to exit a vehicle so that the officer may deal with the driver who has committed a traffic offense without encountering an undue risk of harm.

2. As *Mimms* itself demonstrates, this Court's precedents and Fourth Amendment doctrine do not require a showing of particularized suspicion before an officer may order the passenger out of the car. Although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure, * * * the Fourth Amendment imposes no irreducible requirement of such suspicion." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560-561 (1976) (footnote and citation omitted); see *Vernonia Sch. Dist.* v. *Acton*, 115 S. Ct. at 2391. Consistent with that principle, and contrary to the Court of Special Appeals' rejection of an "automatic" rule when the officer lacks "individualized or particularized suspicion," Pet. App. 25a-26a, the Court in other contexts has declined to require reasonable suspicion to sustain minimal intrusions incidental to the valid stop of a motor vehicle. See *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444 (1990) (stops at highway sobriety checkpoints); *United States* v. *Martinez-Fuerte*, *supra* (stops at permanent checkpoints near border).

Indeed, in part because of the reasonable safety considerations of officers, this Court has upheld the

detention of an occupant of a residence during the execution of a search warrant. *Michigan* v. *Summers*, 452 U.S. 692, 702 (1981). Even though in *Summers* "no special danger to the police is suggested by the evidence in this record," the authority of the officers to detain the occupants was upheld over a Fourth Amendment challenge because "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Id.* at 702-703.[7] For the same reasons, the need to protect an officer's safety during a traffic stop makes it reasonable to order the passenger to exit the stopped vehicle, even when no specific suspicion has focused on the passenger.

3. The Maryland Court of Special Appeals would require officers to have an articulable basis for "heightened caution" before asking passengers to exit from vehicles. Pet. App. 31a-32a. The court left open, however, whether the applicable standard would mirror that adopted in *Terry* v. *Ohio*, 392 U.S. 1 (1968), for an investigative stop and frisk, or would be

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[7] In *Summers*, the Court noted that the existence of probable cause for the search warrant of the residence "gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of the occupant." 452 U.S. at 704. But the Court made that observation in the context of announcing a per se rule that no such particularized suspicion was necessary to justify the detention of an occupant of a premises subject to a valid search warrant: "Thus, for Fourth Amendment purposes, we hold that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.* at 705 (footnote omitted).

some undefined lower threshold. Pet. App. 25a-32a. Neither approach would be workable. In *Mimms*, this Court rejected a requirement of particularized suspicion in favor of a "bright line" rule that afforded officers discretion to ask the driver to exit the car, irrespective of whether the situation raised the officer's suspicion. See 434 U.S. at 111. The rule in *Mimms* is thus a precaution; it permits an officer to avoid an unexpected safety risk. This "ounce of prevention" would be lost if the officer had to wait until his suspicions were aroused about the potential risk from the passenger before the officer could take protective measures.

Nor would it be feasible to invent a new tier of Fourth Amendment analysis involving a lesser level of suspicion than required for a *Terry* stop and frisk. See Pet. App. 28a-30a (discussing cases purporting to apply a "heightened caution" approach). Quite apart from the indefinite nature of such a threshold, "by requiring a policeman conversing with a motorist constantly to monitor the information available to him to determine when it becomes sufficient to establish ['heightened caution'], the rule * * * would be extremely difficult to administer." *Berkemer*, 468 U.S. at 435 n.22. The rule adopted by the Maryland Court of Special Appeals, therefore, threatens to create unnecessary confusion for officers seeking to maintain a safe situation during a routine traffic stop.

CONCLUSION

The judgment of the Court of Special Appeals of Maryland should be reversed.

Respectfully submitted.

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October Term, 1995

STATE OF MARYLAND,

Petitioner,

vs.

JERRY LEE WILSON,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF
MARYLAND.

BRIEF AMICI CURIAE
OF
AMERICANS FOR EFFECTIVE
LAW ENFORCEMENT, INC.,
JOINED BY
THE INTERNATIONAL ASSOCIATION OF
CHIEFS OF POLICE, INC.,
THE NATIONAL DISTRICT ATTORNEYS
ASSOCIATION, INC.,
THE NATIONAL SHERIFFS' ASSOCIATION, AND
THE POLICE LAW INSTITUTE,
IN SUPPORT OF THE PETITIONER.

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ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND.

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., THE NATIONAL SHERIFFS' ASSOCIATION, AND THE POLICE LAW INSTITUTE, IN SUPPORT OF THE PETITIONER.

This Brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioner and Respondent. The letters of consent have been filed with the Clerk of this Court, as required by the Rules.

INTEREST OF *AMICI CURIAE*

Americans for Effective Law Enforcement, Inc. (AELE), is a national not-for-profit educational organization that conducts legal research and provides law bulletins and continuing legal education programs for law enforcement administrators and their counsel.

AELE has appeared before this Court as *amicus curiae* more than one hundred times and many times in other federal and state appellate courts. Its *amicus* program seeks to establish a body of law that enhances the effectiveness of law enforcement agencies, in a constitutional manner.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publications, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all our citizens.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the nation's sheriffs and jail administrators. While it is interested in the effective admin-

istration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

The Police Law Institute is an independent research and training facility located on the University of Iowa's Oakdale Research Campus. Started in 1983, the Institute currently provides legal training to police agencies in several states through the use of computer-based lessons and printed reference summaries. Its primary mission is to train law enforcement officers and supervisors, on a continuing basis, to be legally effective and efficient in the protection of the people in their communities from criminal activity, while respecting the legal rights of each individual they encounter.

Amici are national professional organizations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of administering policies and procedures involving the conduct of traffic stops; and (2) prosecutors and police legal advisors who are called upon to advise law enforcement officers and administrators in connection with such matters.

Because of the relationship with our members and clients, and the composition of our membership and directors—including active law enforcement administrators and counsel at the local, state, and national level and law enforcement trainers—we are particularly aware of the impact of the ruling of the court below. We respectfully ask this Court to consider this information in reaching its decision in this case.

ARGUMENT

THIS COURT SHOULD ADOPT A "BRIGHT LINE" RULE THAT WHEN A LAW ENFORCEMENT OFFICER MAKES A LAWFUL TRAFFIC STOP, THE OFFICER HAS AN ABSOLUTE RIGHT TO CONTROL BOTH THE DRIVER AND PASSENGERS BY REQUIRING THEM TO EITHER REMAIN INSIDE IN THE VEHICLE OR EXIT AND REMAIN IN THE IMMEDIATE VICINITY DURING THE STOP.

A police officer on solo patrol observed a car speeding on an interstate highway and pulled it over (although it is noteworthy that the vehicle continued for approximately 1½ miles after the officer activated his lights and siren before stopping). The officer could see three people in the car, two in the front seat, and one person in the back seat. There was much turning and looking at the officer, ducking down, and movement, even after the car stopped.

The officer testified that he was hesitant to approach the car. The driver, McNichol, was "unusually" nervous and trembling. The defendant, a front seat passenger, was sweating and extremely nervous.

The officer directed defendant to exit the car. He testified that his reasons for taking this action were:

> Well, due to the movement in the vehicle I thought possibly there could be a handgun in the vehicle. I had concern for my safety. At that time when Mr. McNichol went back to the car, I asked Mr. Wilson to step out, that is my whole purpose of not approaching the vehicle, by myself, with three occupants in the vehicle, I wanted each one out at a time to speak to each individual, for my safety.

Joint Appendix 32, *Maryland v. Wilson*, No. 95-1268.

When defendant exited the car, he dropped narcotics in plain

view of the officer. He was charged with possession of the narcotics with intent to distribute, and related offenses.

The court below, *State v. Wilson*, 340 Md. 502, 667 A.2d 342 (Md. App. 1995), refused to extend what it called the "automatic police prerogative" of having drivers in traffic stops exit their vehicles—under the rule of *Pennsylvania v. Mimms*, 434 U.S. 106 (1977)—to passengers as well. Reasonable suspicion, the Maryland court said, is required for an order to a passenger to exit an automobile in a simple traffic stop setting.

As this Court is aware, there is a considerable split among the federal and state courts concerning whether the *Mimms* rule applies to both passengers and drivers. The cases are ably collected and presented in the brief of the petitioner and will not be repeated here. It appears that the majority of cases have ruled in favor of an officer's control of passengers, as well as drivers. These courts have understood *Mimms* as permitting this (a view shared by the dissent in *Mimms* and not refuted by the majority in that case. *Mimms* at 122-23).

If there is one touchstone in all the cases that have ruled in favor of an absolute rule for passengers, it is officer safety. These courts have wisely balanced the right of privacy against the potential danger of death and injury that officers face in *every* traffic stop. For these courts this grave and ever-present potential has tipped the balance.

No more recent or eloquent statement to this effect exists than in the Ninth Circuit Court of Appeals decision in *Ruvalcaba v. City of Los Angeles*, 64 F.3d 1323 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1841 (1996). In *Ruvalcaba* the court ruled that a police officer who has lawfully stopped a vehicle for a traffic violation may order the passengers as well as the driver of the vehicle to step outside the car despite the absence of probable cause or reasonable suspicion of criminal activity, and even if the situation appears normal and benign.

The court held that the *de minimis* intrusion into an occupant's liberty is outweighed by the government's interest in officer safety.

> The primary basis behind the legitimate and weighty governmental interest in *Mimms* was the danger to police officers when confronting a driver seated in an automobile. (citations omitted) . . . That danger is equally grave when a police officer confronts passengers; indeed, it may be more dangerous to have the driver outside the vehicle while one or more other passengers are left inside. One or more passengers may be seated in the back seat of a car, or the back of a sport utility vehicle, making it difficult, if not impossible, for the officer to keep a close watch on these passengers. *See United States v. Salas*, 879 F.2d 530, 535 (9th Cir.), *cert. denied*, 493 U.S. 979, 110 S. Ct. 507, 107 L. Ed. 2d 509 (1989) ("A weapon can be concealed under the seat of a vehicle. It is readily accessible to be used to harm any police officer who approaches an automobile . . . ."). Having all occupants step out of the vehicle protects the safety of the officer while the officer is dealing with the driver regarding the traffic violation. We believe that the governmental interest weighs strongly in favor of permitting a police officer to order all occupants out of a vehicle.
>
> The intrusion into a passenger's liberty is minimal. The automobile has been stopped lawfully, and the passenger is, for the time being, going nowhere. As with the driver, "the only question is whether he shall spend that period sitting [in the car] or standing alongside it." *Mimms*, 434 U.S. at 111, 98 S. Ct. at 333. The passenger is not asked to expose any more of his person than is already exposed by virtue of being in the vehicle during the traffic stop. Of course, no additional intrusion into the passenger's liberty, such as a frisk or prolonged detention, may be justified by the traffic stop absent some additional suspicion. The mere order to exit the vehicle, however, is significant.
>
> The balance of interests in this case weighs heavily in favor of police officers. In the area of police confrontations

> with occupants of legally stopped vehicles, wide deference is appropriately granted to the officers' need for protection, especially when the intrusion is so minimal. We hold that once a police officer has lawfully stopped a vehicle for a traffic violation, the officer may, consistent with the Fourth Amendment and despite the absence of probable cause or reasonable suspicion of criminal activity, order all occupants of the vehicle to step outside.
>
> Although we recognize that the driver, not the passengers, was the cause of the traffic stop, that fact does not alter the balance of interests. The weighty interest in officer safety is not dependent on the danger from the driver as a result of being stopped for a traffic violation, it is dependent on the inherent danger from approaching seated people in a vehicle, whether driver or passenger. Justice Stevens, dissenting in *Mimms*, recognized this logic. *Mimms*, 434 U.S. at 122, 98 S. Ct. at 339 (Stevens, J., dissenting) ("Because the balance of convenience and danger is not different for passengers in stopped cars, the Court's logic necessarily encompasses the passenger.").

64 F.3d at 1326-28.

Amici know that concerns such as the ones expressed by the Ninth Circuit Court of Appeals are well-founded. In part, they are borne out by recent government reports on assaults upon police officers. The statistics show quite vividly that traffic stops rank among the most dangerous operations law enforcement officers perform.

For example, in 1992, 81,252 law enforcement officers were assaulted, resulting in 29,673 injuries. Nine percent of these assaults took place while the officers were making traffic pursuits or stops. United States Department of Justice, Federal Bureau of Investigation, *Uniform Crime Reports* 61 (1992).

In 1993, 66,975 officers were assaulted, with 24,031 injuries, and again 9% of the assaults were attributable to traffic pursuits

or stops. United States Department of Justice, Federal Bureau of Investigation, *Uniform Crime Reports* 65 (1993).

The reports for 1994 are equally disturbing: 64,912 assaults; 23,194 injuries; 9% in traffic pursuits or stops. United States Department of Justice, Federal Bureau of Investigation, *Uniform Crime Reports* 67 (1994). The statistics for the year 1994 are the most recent available.

Law enforcement officers who enforce traffic laws are required to stop vehicles and come into close contact with the drivers. An officer's vision is limited by the physical structure of the car, van, or truck; the amount of natural and artificial light; and the usual distraction of passing cars.

An officer's safety is enhanced if he can see the faces of all occupants (to observe hostility or panic) and their hands (to know they are not holding weapons). Many, if not most of the officers who have been killed while enforcing traffic laws, did not perceive their final stop as one which involved a high personal risk.

If it is an unreasonable intrusion to order a passenger to stand outside a vehicle, it follows that if an officer approaches a car from the curb side (to avoid traffic hazards), he cannot lawfully direct the passenger to open the vehicle's door for safety purposes. Can an officer order a passenger to lower a car window, particularly one that is darkly tinted and only partially open? That action, surely, implicates the Fourth Amendment as well!

How far do the protections of the Fourth Amendment go? Could an officer order a passenger to keep his hands in his lap so they can be seen?

Many police instructors teach that it is often safer for a lone officer to require all passengers to remain in the vehicle, so that

he is not outflanked.[1] That too, would be a "detention" under the reasoning of the court below and would infringe the "right" of passengers to stand by the side or behind a police officer.

If the rationale of the court below is sound, absent suspicious circumstances, a police officer cannot order passengers to exit a vehicle, nor may he require them to remain in the car. He may not direct them to open a door, lower a window, or keep their hands in full view. *Amici* suggest that with the proliferation of handguns and the frequency of tinted car windows, traffic enforcement officers unjustifiably will be exposed to grave danger.

Moreover, an officer's heightened fear of an assault may cause him to reduce the number of legitimate traffic stops he makes. The public at large will suffer from a diminishment in traffic safety.

Amici submit that the reasonableness requirement of the Fourth Amendment anticipates a balancing of interests between the physical safety of law enforcement officers and the comfort and rights of a vehicle's occupants.

Amici suggest that society will be better served by prioritizing officer safety. Firstly, because the intrusion to vehicle occupants is minimal. Secondly, there is a general danger to everyone who might encounter a vehicle that is fleeing the scene of an assault upon an officer. Thirdly, as a matter of fundamental fairness, society should provide for the job-related safety of those persons who are sworn to serve and protect it. When an

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[1] *See, e.g.*, Adams, McTernan, and Remsberg, *Street Survival: Tactics for Armed Encounters* 79, 82 (1980, 1995); Remsberg, *The Tactical Edge: Surviving High Risk Patrol* 277 (1986).

officer can control the location of all occupants of a vehicle during a traffic stop, the safety of all persons is enhanced.

Amici further submit that the adoption of a bright line rule covering passengers in traffic stops will further the Court's recognition in *New York v. Belton*, 453 U.S. 454, 458 (1981), that "the protection of the Fourth and Fourteenth Amendments 'can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.'" *Amicus* AELE has argued in Fourth Amendment cases before this Court, such as *Belton*, that bright line guidance for the police is an effective means of ensuring police adherence to Fourth Amendment requirements. Such guidance can be equally effective in serving the equally necessary goal of police officer safety.

CONCLUSION

Amici urge this Court to reverse the decision of the court below on the basis of the precedents of this Court and sound judicial policy.

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CASE NO. 95-1268

IN THE SUPREME COURT OF THE ~~UNITED STATES~~
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STATE OF MARYLAND,
Petitioner,
vs.
JERRY LEE WILSON
Respondent.

ON WRIT OF CERTIORARI TO THE MARYLAND COURT OF SPECIAL APPEALS

BRIEF OF AMICI CURIAE STATES OF OHIO, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, ILLINOIS, IOWA, KANSAS, LOUISIANA, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, THE COMMONWEALTHS OF KENTUCKY, MASSACHUSETTS AND PENNSYLVANIA, AND THE VIRGIN ISLANDS IN SUPPORT OF PETITIONER

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STATEMENT OF AMICUS INTEREST

Amicus State of Ohio and 38 other *amici* States write this brief to urge the Court to reverse the decision of the Maryland Court of Special Appeals and to highlight the importance of this issue to the States. In *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), the Court held that police officers may automatically order the driver of a vehicle to exit the car during a legitimate traffic stop. The question presented here is whether the officer's authority to require the driver to exit the car extends to the vehicle's passengers.

In the decision below, the Maryland Court of Special Appeals held that the Fourth Amendment does not permit automatic exit orders in this setting, concluding instead that the officer must establish "heightened caution" before requiring passengers to exit the car. In doing so, the court ignored the underlying Fourth Amendment teachings of this Court in *Mimms* and subsequent cases, devalued the State's interest in protecting law enforcement officers, and overstated the liberty interests of passengers in a properly-stopped vehicle.

Like Maryland, the *Amici* States are entrusted with enforcement of highway safety violations. In meeting that responsibility, the *Amici* States are broadly concerned with judicial decisions that make the already-perilous job of law enforcement still more perilous, particularly with respect to the often dangerous context of traffic stops. Accordingly, the *Amici* States join together in asking the Court to reverse the lower court's decision.

SUMMARY OF ARGUMENT

The decision of the Maryland Court of Special Appeals contains three independent flaws. First, in assessing the Fourth Amendment reasonableness of the law enforcement officer's conduct in this instance, the court failed to respect the empirically-established dangers that police officers face from passengers of properly-stopped vehicles and overvalued the extent of the liberty intrusion that exit orders impose on such passengers. Second, the court overlooked the underlying Fourth Amendment teachings of *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) and its progeny and introduced an unworkable and highly impractical standard for police officers to observe in handling the risky setting of a vehicle stop. Third, the court created a Hobson's choice for officers, which in the end may well compromise their ability to reap the benefits of the settled *Mimms* rule. For example, under the decision below, officers are put to the dilemma of either ordering the driver to exit the vehicle under *Mimms* (which prevents officers from keeping an eye on the passengers) or allowing the driver and passengers to stay in the car (which prevents officers from realizing the benefits of *Mimms*). No plausible reading of the Fourth Amendment requires such a result.

ARGUMENT

FOR ESSENTIALLY THE SAME PUBLIC-SAFETY REASONS THAT POLICE OFFICERS MAY ORDER DRIVERS OF LAWFULLY STOPPED CARS TO EXIT THE VEHICLE UNDER *PENNSYLVANIA v. MIMMS*, 434 U.S. 106 (1977), THEY ALSO MAY ORDER PASSENGERS OF SUCH VEHICLES TO MAKE AUTOMATIC EXITS AS WELL.

"The touchstone" of any "analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances'" of the law enforcement officer's conduct. *Pennsylvania v. Mimms*, 434 U.S. 106, 108 (1977) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)). "Reasonableness," moreover, "depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" *Id.* (quoting *United States v. Brignoni - Ponce*, 422 U.S. 873, 878 (1975)). *See also Whren v. United States*, ___ U.S. ___, 116 S. Ct. 1769 (1996).

In balancing this "public interest" against the "individual's right to personal security," the Court in *Pennsylvania v. Mimms* held that a police officer may automatically order the driver of a vehicle to exit the car during a legitimate traffic stop. In doing so, the Court made two critical observations. On the one hand:

> Establishing a face-to-face confrontation diminishes the possibility, otherwise substantial, that the driver can make unobserved movements; this, in turn, reduces

> the likelihood that the officer will be the victim of an assault.
>
> We think it too plain for argument that the State's proffered justification--the safety of the officer--is both legitimate and weighty.

434 U.S. at 110. On the other hand, the intrusion on the driver's liberty in these circumstances "hardly rises to the level of a 'petty indignity.'" *Id* at 111. The Fourth Amendment balance struck in *Mimms* thus turned on the significant dangers to law enforcement officers presented by such encounters and the *de minimis* liberty intrusion occasioned by exit orders. Applied here, that same test requires extension of the *Mimms* automatic-exit rule to the passengers of a properly-stopped vehicle.

A. The State's Recognized Interest In Protecting Law Enforcement Officers From Potentially Dangerous Vehicle Occupants Increases As The Number Of Vehicle Occupants Increases.

As a general matter, the peril to law enforcement officers responsible for making routine traffic stops is significant and well-documented. As this Court has repeatedly recognized, traffic stops result in a high percentage of officer fatalities. *See e.g., Adams v. Williams*, 407 U.S. 143, 148 n.3 (1972) (approximately 30 per cent of police shootings occur when a police officer approaches an automobile); *accord, Mimms*, 434 U.S. at 110; Bristow, *Police Officer Shootings--A Tactical Evaluation*, 54 J.Crim.L.C. & P.S. 93 (1963).

> That this prophylactic authority [to remove vehicle occupants] is essential is attested by the number of police officers wounded or killed in the process of making inquiry in borderline, seemingly minor violation situations -- for example, where the initial stop is made for a traffic offense but, unknown to the officer at the time, the vehicle occupants are armed and engaged in or embarked on serious criminal conduct.

Foley v. Connelie, 435 U.S. 291, 298 (1978). Not surprisingly, then, "a significant percentage of murders of police officers occurs when the officers are making traffic stops." *United States v. Robinson*, 414 U.S. 218, 234 n.5 (1973).

Regrettably, in the two decades since *Mimms* was decided, the number of assaults upon police officers has continued to grow. FBI statistics show that between 1990 and 1994, the number of police officers murdered in the line of duty increased by 15%. Federal Bureau of Investigation, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted* (1994), 3 (hereinafter "FBI Report"). During 1994 alone, moreover, 76 law enforcement officers were killed in the line of duty. FBI Report, 3. Of those 76 officers, 11 were killed while enforcing traffic laws. FBI Report, 3.

More generally, between 1985-1994, 708 officers were killed -- 97 of them during traffic stops. FBI Report, 29. Sixty-five of these traffic-stop murders occurred while the officer was alone, FBI Report, 32, and 73 of the officers were killed by handguns, which may be easily concealed within a vehicle or on a person, FBI Report, 34.

Nor does the level of experience of police officers by itself account for these grim statistics. Of the 708 officers killed in the line of duty between 1985-1994, 173 were between the ages of 25-30, 256 were between the ages of 31-40, and 222 were over 40 years old. Likewise, during the same time span, 187 officers killed in the line of duty had from 1-4 years of service, 197 from 5-10 years of service, 281 over 10 years of service. (The FBI Report does not set forth the age or level of experience of the 97 officers who were killed during this time period while engaged in traffic stops.)

The number of assaults in this setting is no less striking.[1] In 1994, 64,912 line-of-duty assaults were reported resulting in 23,194 personal injuries. FBI Report, 73. Roughly 14 out of every 100 law enforcement officers were assaulted during this time, with 9% of the assaults occurring during traffic stops or pursuits. FBI Report, 67. Of the 5,762 traffic stop assaults, moreover, roughly one-third occurred while the officer was alone, and most of the injuries resulted from easily concealed weapons. *Id.* at 71-73.

To Ohio's knowledge, there are no statistics detailing the number of assaults or murders arising from passengers as opposed to drivers during traffic stops. However, several sources confirm what common sense suggests -- that unidentified passengers of a stopped vehicle are no less likely to pose a danger to law enforcement officers than

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[1] Ohio State Highway Patrol records indicate that in 1995 alone, the Patrol experienced 51 officer assaults and 308 incidents of resisting arrest. With few exceptions, each of these cases evolved from traffic-related encounters. The Ohio Highway Patrol is just one of many police jurisdictions in Ohio with power to enforce the traffic laws.

unidentified drivers. For example, several reported cases concern instances in which passengers, either in concert with a driver or singly, initiated confrontations with a police officer during a vehicle stop. *See, e.g., Hester v. State*, 544 S.W.2d 129 (Tex. Crim. App. 1976) (driver and passenger opened fire on police officer during a routine traffic stop, killing two officers); *Jones v. Texas*, 480 S.W.2d 623 (Tex. Crim. App. 1972) (passenger jumped from car as police officer approached, grabbed and attempted to strangle police officer, and stuck a .22 pistol in his stomach); *Kansas v. White*, 508 P.2d 842 (Kan. 1973) (passenger produced gun and shot at three officers).

Newspaper articles are equally rife with references to passenger assaults on police officers. *See, e.g.*, Wesley Loy, *Police Seek Man Who Shot Officer; Bulletproof Vest Saves Cop From Serious Injury*, Orlando Sentinel Tribune, March 20, 1990 (passenger fired 4 shots at officer); Richard Saltus, *Man Allegedly Pulls Gun On Trooper Before Help Arrives For An Arrest*, Boston Globe, March 27, 1994 (passenger threatened officer with pistol during traffic stop); Chris Moeser, *Man Shot Twice By Mesa Officer At Traffic Stop*, Phoenix Gazette, October 26, 1994, at B1 (passenger pushed driver out of car and attempted to run officer down with car); Calvin Lear, *Lawyers File Motion To Delay Trial*, Capital City Press, Baton Rouge, La., Saturday State-Times/Morning Advocate, August 12, 1995, at 4B (passenger shot officer in the head as officer attempted to arrest driver during traffic stop). *See also* Veronica T. Jennings, *For Officers, Traffic Stops Are Full of Potential Danger; Best of Circumstances Can End In Tragedy*, Washington Post, April 16, 1990, at A1 ("The only routine traffic stop is the one you drive away from.") (quoting Prince George's County Cpl. Chuck Cooke).

At bottom, the Maryland Court of Special Appeals failed to appreciate the significance of statistics like these and failed to respect the stark dangers of stopping a vehicle containing multiple occupants as opposed to a vehicle containing merely a driver. In the lower court's view, the need to protect officers from a passenger was "just as great" as the need to protect them from a driver. The essential fact of the matter, however, is this: An officer who stops a crowded car faces far more peril than one who stops a car with only a driver.

B. Ordering Passengers To Exit A Lawfully-Stopped Vehicle Constitutes A *De Minimus* Intrusion On Their Personal Liberty.

Not only did the lower court improperly minimize the increased danger to the police officer of stopping a car with several occupants as opposed to just one, the Court also exaggerated the liberty interest of the passengers. Contrary to the lower court's conclusion, the passenger of a lawfully-stopped vehicle under these circumstances does not face a greater personal liberty intrusion than the driver. Both individuals have voluntarily chosen to use the State's highways. Both individuals are momentarily prohibited from continuing to their immediate destination. And both individuals face an equally *de minimus* liberty intrusion by being ordered to exit the vehicle. As with the driver, the passenger of a lawfully-stopped vehicle realistically is not going anywhere. The only real question is whether the passenger is going to spend the stop sitting in the car or standing alongside it. *Mimms*, 434 U.S. at 111. And, of course, even if passengers wish to leave the scene, they still have to exit the vehicle before doing so.

Moreover, the directive to passengers to leave the vehicle is no different from directives customarily given by police officers to citizens in other settings. A police officer thus may take "control of the scene" in the carrying out of his or her duties. *State v. Barger*, 874 S.W.2d 653 (Tenn. Crim. App. 1994). The "scene" encompasses where a crime, a traffic accident, a medical emergency, or a fire has occurred, and the policeman's purpose may be to "exclude bystanders and curious sightseers to facilitate the administration of aid to the victims and the gathering of evidence." *Barger*, 874 S.W. 2d at 653. Indeed, most States prohibit interference with the carrying out of a police officer's duties. *State v. Lashinsky*, 404 A.2d 1121, 1125-26 (N.J. 1979) ("In the performance of their duties they may give reasonable directions . . . [A]n individual toward whom such directions are directed has a correlative duty to obey them."). An officer making a traffic stop is also in charge of the scene, and an order to a passenger to depart a vehicle is precisely the kind of directive that reasonable citizens should anticipate following. Whatever the situation, in short, citizens reasonably anticipate and accept the right of police officers to issue such sensible (albeit liberty-infringing) directives under these circumstances.[2]

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[2] Acceptance of police officer directives has a long history. At common law, the sheriff had the authority to direct the populace to aid in the enforcement of the law. *See Compton-Waldrop v. City of Va. Beach Police Dept.*, 463 S.E. 2d 675, 677 (Va. Ct. App. 1995) ("As in the days of Edward I, the citizenry may be called upon to enforce the justice of the state, not faintly and with lagging steps but honestly and bravely and with whatever implements and facilities are convenient and at hand.") While the doctrine of "posse comitatus" may itself have diminished over time, the notion that police may direct citizens at the scene of a crime or investigation still exists.

For these reasons, the Court has aptly noted the reasonable expectations of motorists during a roadside detention:

> The vast majority of roadside detentions last only a few minutes. A motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he most likely will be allowed to continue on his way.

Berkemer v. McCarty, 468 U.S. 420, 437 (1984). Passengers in such vehicles have no right to expect anything more or less.

In the end, what was true in *Mimms* is just as true here: Not only is the insistence of police that passengers temporarily exit a lawfully-stopped car not a "serious intrusion upon the sanctity of the person," but it hardly rises to the level of a "petty indignity." 434 U.S. at 111 (citation omitted). It thus seems implausible that the same Fourth Amendment that allows an officer to compel drivers to exit a car under *Mimms* restricts the exercise of that right when there are more (rather than fewer) dangers to the officer.

Nor, in any event, will the lower court's "heightened caution" standard be workable in practice, be sufficient to protect the officer's safety or even be respectful of the officer's rights under *Mimms*. The new standard is not workable because there is no principled way to assure that it will have predictable meaning to officers, judges and citizens alike. The new standard does not protect officers because by

the time officers perceive additional danger signals from the passengers of a stopped vehicle (beyond those normally attendant to traffic stops), it may be too late for the officers to protect themselves. And, worst of all, the new standard does not even allow officers to reap the benefits of *Mimms*. Under the lower court's decision, officers face the dilemma of either removing the driver from the car under *Mimms* (thus making it more difficult to keep an eye on the passengers) or leaving the driver in the car (thus giving up the automatic-exit rights provided by *Mimms*). At all events, the lower court's decision injects additional uncertainty and danger into an already uncertain and dangerous situation, and mistakenly uses the Fourth Amendment as the basis for doing so. The decision should be reversed.

CONCLUSION

For the foregoing reasons, the decision of the Maryland Court of Special Appeals should be reversed.

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The STATE of MARYLAND,

Petitioner,

v.

JERRY LEE WILSON,

Respondent.

On Writ of Certiorari to the Court of Special Appeals of the State of Maryland

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Time, *On the Job Mayhem*, July 22, 1996, at 22 9

STATEMENT OF INTEREST OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS

Amicus Curiae the National Association of Police Organizations, Inc. (hereinafter "NAPO") submits this brief in support of Petitioner the State of Maryland's arguments for reversal of the judgement in this case of the Court of Special Appeals of the State of Maryland which affirmed the trial court's suppression of physical evidence seized from Respondent, having found the seizure of the evidence in question to have been violative of the Fourth Amendment to the United States Constitution.

NAPO is a nationwide association of professional, labor and trade organizations representing state, local and federal law enforcement officers. Through its 3,500 state and local affiliates, NAPO actively represents approximately 190,000 sworn, rank-and-file law enforcement officers throughout the country, including, *inter alia*, state troopers, highway patrol officers and traffic enforcement personnel. In 1994, NAPO founded the National Law Enforcement Officers' Rights Center, which advocates the necessity of assuring fundamental due process and workplace safety rights for law enforcement officers in the face of increasing political pressures for the restraint, investigation and prosecution, both civil and criminal, of police.

NAPO has an important interest in this matter, as this case presents issues the resolution of which will define the extent to which law enforcement officers throughout the United States may seek to protect themselves and the motoring public when stopping a motor vehicle which contains more than one

occupant. With the possible exception of responding to a violent domestic dispute, pulling over an occupied motor vehicle constitutes one of the least predictable, and hence most potentially dangerous, of a police officer's "routine" duties. Each such traffic stop presents a situation where an officer, usually alone and often distant from any support, must confront one or more individuals unknown to him or her, who are effectively ensconced within a mobile steel barricade replete with plenty of spaces from which to procure a weapon. The roadway traffic itself also presents a potential threat to the physical safety of the officer and public who are stopped in its midst, and circumstances will dictate whether officers and occupants are safer in their vehicles or afoot in any given encounter. A clear enunciation of the scope and type of authority which a law enforcement officer may properly direct toward the occupants of a lawfully stopped motor vehicle is of tremendous practical importance to the constituent members of NAPO.

NAPO has received the written consent of Petitioner State of Maryland and of Respondent Jerry Lee Wilson to the filing of this brief as required by Rule 37.3 (a) of the Rules of this Court. The original copies of all consents have been filed with the Clerk of the Court as required by that Rule.

SUMMARY OF ARGUMENT

This Court, in evaluating the "reasonableness" of police activities under the Fourth Amendment to the United States Constitution, has held that such reasonableness depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975). In *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), in the context of the lawful stopping of an occupied motor vehicle by police, concern for officer safety *during traffic stops in general* was recognized as of sufficient constitutional significance as to make reasonable a request by the officer that an occupant regarding whom the officer harbored no particularized suspicion (in that case, the driver) alight from the vehicle.

The case at bar again presents the circumstance of a police officer, having lawfully stopped an occupied motor vehicle, requesting that an occupant regarding whom the officer harbors no particularized suspicion (in this case, a front-seat passenger) alight from the vehicle. Because the constitutionally significant facts of this case are not distinguishable from those in *Mimms*, this Court is urged to affirmatively declare that an occupant of a lawfully stopped motor vehicle may be reasonably requested by a police officer to alight from the vehicle, whether the occupant be the driver or a passenger, the sole or one of several persons in the vehicle.

ARGUMENT

I. SO-CALLED "ROUTINE" TRAFFIC STOPS REPRESENT A SIGNIFICANT RISK OF ASSAULT, INJURY AND DEATH TO THE LAW ENFORCEMENT OFFICER INVOLVED.

As this Court recognized in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), a State's concern, in the Fourth Amendment context, for the physical safety of its law enforcement officers "is both legitimate and weighty." *Mimms* at 110. The Court further noted that "we have specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile. 'According to one study, approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile. [Citations omitted].'" *Id.* And that "Indeed, it appears that a significant percentage of murders of police officers occurs when the officers are making traffic stops. [Citations omitted]" *Id.*

Regrettably, from 1977 (the year in which *Mimms* was decided) through the end of 1995, *four hundred and forty-five* (445) officers have been killed in the line of duty while performing traffic enforcement tasks. National Law Enforcement Officers Memorial, *Police Officers Killed Since 1977 During Traffic Stops, Etc.* 78 (July 11, 1996) (unpublished compilation of data). One hundred ten (110) of these officers were shot to death with firearms by occupants of a motor vehicle they had stopped, and one was bludgeoned to death with his own flashlight. *Id.* Another ninety-eight (98) officers lost their lives when they were feloniously run down

by occupied motor vehicles (as opposed to *accidentally* run down). *Id.*

As this Court noted in *Mimms*, "[t]he hazard of accidental injury from passing traffic to an officer" is also constitutionally cognizable. *Mimms*, at 111. From 1977 through the end of 1995 two hundred and thirty-five (235) officers were struck and killed accidentally while attending to traffic scenes. National Law Enforcement Officers Memorial, *supra*.

Note that these figures represent only the number of officers actually *killed* at traffic scenes, the number of officers assaulted or injured is much higher. In 1994 alone, the most recent year for which United States Department of Justice figures are available, *five thousand seven hundred and sixty-two* (5,762) law enforcement officers were *criminally* assaulted with weapons during traffic pursuits and stops. Federal Bureau of Investigation, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted 1994* 71 (1995). The number of officers *accidentally* struck, who lived, would appear to be much higher if the relationship between accidental and intentional killings of police in traffic situations illustrated by the National Law Enforcement Officers Memorial data correlates to the relationship between accidental and intentional injury to officers (but without death) in the traffic stop context.

Numerous studies of assaults upon police, injuries to police, and the killing of police, both before and after *Mimms*, have consistently confirmed that traffic stops represent one of the most (and often the single most) hazardous of circumstances in modern police work.

The FBI, in analyzing the felonious killings of police officers nationwide during the period from 1975 through 1985, concluded that one hundred twenty-nine (129) officers, or 12.5% of all officers feloniously killed during that time frame, were killed during traffic stops. Federal Bureau of Investigation, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted 1975-85* (1986). Only attempted arrests for robbery resulted in more officers being killed. *Id.* When the FBI studied killings of police officers nationwide in a slightly different time frame, 1980 through 1989, traffic stops appeared to be even more lethal for police, accounting for 14% of all police killings. Federal Bureau of Investigation, *Uniform Crime Reports Supplement: Law Enforcement Officers Killed and Assaulted 1989* 18 (1989). The FBI found that this trend continued through 1990 as well. Federal Bureau of Investigation, *Uniform Crime Reports Supplement: Law Enforcement Officers Killed and Assaulted 1990* 17 (1991) (13% of all officers killed slain at traffic stops or pursuits).

A similar study evaluating the felonious killing of police officers nationwide during the years 1978 through 1980 found that fifty-five (55) officers, or 19.2% of all officers feloniously killed during those years, lost their lives in traffic stops. D. Konstantin, *Homicides of American Law Enforcement Officers, 1978 - 1980*, 1 Justice Quarterly 1, 29-37 (March, 1984). Konstantin's analysis found traffic stops to be the single circumstance most likely to lead to the death of an officer.

Assaults upon police officers which do not result in the death of an officer exhibit a similar pattern of danger concerning traffic stops. A study of assaults committed against

Detroit police officers during the period July 1, 1973 through June 30, 1974 concluded that 19% of all assaults on police occur in traffic stop circumstances. This was the single greatest identified risk factor in assaults upon Detroit officers. J. Bannon, *Assaults Upon Police Officers: A Sociological Study of the Definition of the Situation* (1976) (unpublished Ph.D. dissertation number AAD76-26108, available through University Microfilms, Ann Arbor, Michigan). Similarly, an analysis of assaults upon police in thirty-seven cities in Oklahoma, New Mexico, Arkansas, Louisiana and Texas during 1973 found that two hundred twenty-seven (227) instances of assault, or 12% of all assaults on police reported, arose in traffic stops. S. Chapman, C. Swanson & C. Meyer, *Descriptive Profile of the Assault Incident* (1974).

Focusing more particularly on assaultive incidents where officers sustain physical injuries but live, the International Association of Chiefs of Police found that in the ten months from July, 1970 through April, 1971 9.8% of all reported physical injuries to police officers occurred in traffic stop circumstances. International Association of Chiefs of Police, *Annual Law Enforcement Casualty Report* (1971). Traffic stops were found to be second only to general disturbances in terms of risk to police officers. *Id.* In yet another study, this one focusing on the fatal as well as non-fatal shootings of Chicago police officers by civilians during the period from 1974 through 1978, researchers found that traffic stops accounted for 3.7% of all firearm woundings of police officers. This figure was second only to general disturbances and robbery arrests in terms of risk of an officer being shot. W. Geller & K. Karales, *Split-Second Decisions: Shootings of and by Chicago Police* (1981) (portions reprinted in H. W. More,

Jr. (ed.), *Critical Issues in Law Enforcement* (4th rev. ed. 1985)).

Turning our attention to cases in which officers shot other persons in the course of duty, studies have again consistently found that traffic stops constitute a significant threat to the physical safety of police officers. W. Geller & K. Karales's study of Chicago police, cited above, discovered that traffic stops accounted for 7% of all shootings by Chicago police for the period studied (1974 through 1978). Geller & Karales, *supra*. A study of police shootings in seven American cities similarly found that 8% of those shootings occurred in a traffic stop context. C. Milton, J. Halleck, J. Lardner & G. Albrecht, *Police Use of Deadly Force* (1977) (portions reprinted in H. W. More, Jr. (ed.), *supra*). A 1978 study of New York City police officers found that 12% of shootings of citizens by police occurred in traffic stop situations. J. Fyfe, *Shots Fired: A Typological Examination of New York City Police Firearms Discharges, 1971-1975* (1978) (unpublished Ph.D. dissertation, School of Criminal Justice, State University of New York-Albany, available through University Microfilms, Ann Arbor, Michigan). Finally, a more recent study of shootings by police throughout New York State revealed that 3% of those shootings arose in a traffic stop context. New York State Commission on Criminal Justice and the Use of Force, *Report to the Governor* (1987) (unpublished report).

Lest one argue that the hazards which traffic stops present to police officers represent solely a *relatively* greater risk compared to other police duties in what is otherwise an increasingly safe profession as measured in absolute terms against other callings, the latest reported statistics from the National Institute for Occupational Safety and Health indicate

that law enforcement officers (in this case, sheriffs) were second only to taxi drivers in terms of being more likely than any other persons in the nation to be physically assaulted and killed on the job. Time, *On the Job Mayhem*, July 22, 1996, at 22. It seems clear, then, that the constitutionally cognizable dangers to the physical safety of police officers as well as motor vehicle occupants in a "routine" traffic stop remain at least as great today as they were when *Mimms* was decided. *Amicus curiae* therefor respectfully urges this Court to again recognize the tremendous public importance attached to an officer's ability to protect him- or herself as well as members of the motoring public during a "routine" traffic stop.

II. LEGITIMATE CONCERN FOR THE PHYSICAL SAFETY OF LAW ENFORCEMENT OFFICERS AND THE PUBLIC MAKES "REASONABLE" A POLICE REQUEST THAT ANY OCCUPANT OF A LAWFULLY STOPPED MOTOR VEHICLE ALIGHT DURING A ROUTINE TRAFFIC STOP.

As this Court recognized in *Mimms*, it is the police officer's encounter with "*a person* seated in an automobile" which constitutes "the inordinate risk" of a routine traffic stop. *Mimms*, at 110 (emphasis supplied). The danger of shootings, this Court emphasized, was great whenever an officer "approached *a suspect* seated in an automobile," regardless of which seat within that automobile the suspect occupied. *Id.* (emphasis supplied). The danger of accidental death or injury to the officer as well as to the occupants of the motor vehicle

is also present to a constitutionally cognizable degree regardless of the number of occupants of the vehicle, or where within the vehicle they sit. It would matter little to an officer who is shot with a firearm procured from inside a vehicle that he or she was shot by someone firing from the front passenger seat instead of the driver's seat. In terms of society's interest in protecting her law enforcement officers, it likewise matters little that the motor vehicle lawfully stopped by a police officer had one occupant or ten when that officer is struck down at the scene.

These "legitimate and weighty" concerns with the safety of police officers as well as the motoring public are what tips the Fourth Amendment balance in favor of an officer being able to request a driver to alight from his or her vehicle. *Mimms*, at 110-11. Because these concerns only increase as the number of vehicle occupants involved increases, *amicus curiae* argues that those same safety concerns make an officer's request to alight directed to any other occupant of a lawfully stopped motor vehicle reasonable under the Fourth Amendment.

One might argue that it was constitutionally permissible in *Mimms* to order the driver from his vehicle only because the driver was already suspected of a traffic offense. Yet while it happened to be the case in *Mimms* that the person against whom the State of Pennsylvania was prosecuting a criminal case had been driving a motor vehicle when he was first stopped by police, that happenstance is not essential to the holding in *Mimms*. *Mimms* involved a challenge to the admission in a criminal case of physical evidence against a person who had been ordered by police to alight from a

lawfully stopped vehicle, just as in the case at bar. And just as in the case at bar, the status of the person as driver or passenger in an admittedly lawfully stopped vehicle, while noted by the parties, is not dispositive of the constitutional issues involved. The Respondent in this case, although he may have occupied a different car seat than the respondent in *Mimms*, sits in the same position vis-a-vis the constitution.

It is impossible, as a practical matter, for police to stop a motor vehicle without at the same time detaining, at least temporarily, all the occupants of that vehicle. Yet it could not seriously be argued that the Fourth Amendment, for that very reason, prohibits police from stopping any vehicle for a traffic offense which contains anyone other than a driver. *All* occupants of a lawfully stopped motor vehicle, then, are equally lawfully inconvenienced, and equally lawfully interrupted in the course of their desired travels. The passengers in a motor vehicle, in addition, would seem to have, if anything, less of a constitutionally recognizable claim to remain in the vehicle than does the driver. They lack even the ephemeral dominion and control over the property that the driver enjoys. The passengers' Fourth Amendment rights to be secure in their own persons from police requests to alight enjoy no greater immunity from being balanced against society's legitimate interests in assuring officer safety than do the driver's.

It should come as no surprise, then, that conducting that balancing yields the same result as the balancing test in *Mimms*. In both cases, the constitutional focus is on what the *governmental* actor is doing, and whether it is reasonable under the circumstances, not on where the occupant was sitting.

Indeed, this Court's constitutional analysis in *Mimms* would properly serve as the template for a holding in the case at bar, substituting only "occupant" for "driver": "Against this important interest [officer and occupant safety] we are asked to weigh the intrusion into the [occupant's] personal liberty occasioned not by the initial stop of the vehicle, which was admittedly justified, but by the order to get out of the car. We think this additional intrusion can only be described as *de minimis*. The [occupant] is being asked to expose to view very little more of his person than is already exposed. The police have already lawfully decided that the [occupant] shall be briefly detained [because the vehicle he was in was lawfully stopped]; the only question is whether he shall spend that period sitting in the [occupant's] seat of his car or standing alongside it. Not only is the insistence of the police on the latter choice not a 'serious intrusion upon the sanctity of the person,' but it hardly rises to the level of a "'petty indignity.'" [citations omitted]. What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety." *Mimms*, at 111.

Finally, it is to be noted that all the Respondent's arguments in his brief in opposition to Maryland's petition for writ of *certiorari* in this case were equally applicable to the *Mimms* scenario. These dire but tired warnings about police abuse of authority, selective enforcement against minority motorists and the specter of an officer ordering Mother Teresa out of a car and into a blizzard are *constitutionally* irrelevant in the given context of an *admittedly lawful* traffic stop. They exhibit the additional vice of being generally completely untrue. America's police execute an exceedingly difficult calling exceedingly well. They are especially diligent during

traffic stops, when the incentive to do things right is the opportunity to return home alive at the end of the day. Requesting a passenger to alight from a lawfully stopped vehicle is as equally constitutionally reasonable as directing that request to the driver. Calls that the sky will fall if this Court recognizes that police may act reasonably in requesting any given occupant to alight from a lawfully stopped vehicle should be rejected as an improvident basis upon which to expound the Constitution.

In all events, a genuine and well-founded public concern with officer and motorist safety, when balanced against an, at most, *de minimis* intrusion upon the personal liberties of motorists, makes reasonable under the Fourth Amendment a request by police that an occupant alight from a lawfully stopped motor vehicle.

CONCLUSION

For the foregoing reasons, *amicus curiae* the National Association of Police Organizations, Inc. respectfully requests that the Court reverse the judgement in this case of the Court of Special Appeals for the State of Maryland, and remand this cause to the trial court for further proceedings not inconsistent with this Court's opinion.

Respectfully submitted this 1st day of August, 1996,

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(9)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF MARYLAND,

Petitioner

vs.

JERRY LEE WILSON,

Respondent.

On Writ of Certiorari to the Court of Special Appeals of Maryland

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the bright-line rule of *Pennsylvania* v. *Mimms* extend to passengers of legally stopped automobiles?

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IN THE

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OCTOBER TERM, 1996

STATE OF MARYLAND,

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Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves one of the great sources of police deaths, traffic stops. Each stop carries the potential for tragedy as the officer encounters the occupants of the vehicle. While only a small portion of these encounters end violently, there is no simple way of readily separating the potentially violent from the routine. The sheer volume of traffic stops ensures a too-plentiful supply of tragedies.

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1. Both parties have given written consent to the filing of this brief.

In *Pennsylvania* v. *Mimms*, this Court helped to alleviate this problem by allowing officers to order drivers out of cars at traffic stops. This bright-line rule aids officer safety by simplifying the traffic stop and giving officers a tactic for maintaining control of the encounter.

The decision below refused to extend *Mimms* to passengers. This decision does not appreciate the added dangers of passengers, and the disparate treatment of drivers and passengers muddies the bright line of *Mimms*. Both of these consequences, if accepted, endanger the lives of police officers and thus are contrary to the rights of victims and society CJLF was formed to advance. CJLF therefore has an interest in the case.

SUMMARY OF FACTS AND CASE

On June 8, 1994, at approximately 7:30 p.m., Trooper David Hughes of the Maryland State Police stopped a white 1994 Nissan Maxima after observing that it was going 64 miles per hour in a 55-mile-per-hour zone and had no license plate. See *State* v. *Wilson*, 664 A. 2d 1, 2 (Md. App. 1995). Both during the pursuit and after the stop, Trooper Hughes noted that the two passengers in the car "had turned and looked at him several times and had on several occasions ducked below the sight level and then reappeared." *Ibid*.

As Trooper Hughes approached the Maxima on foot, the driver, McNichols, left the vehicle. The trooper directed the driver to step towards him, and the two met midway between their vehicles. McNichols produced a Connecticut driver's license and stated that he had rental papers for the car inside the vehicle. During the entire encounter, McNichols appeared to be very nervous. Trooper Hughes instructed McNichols to return to the vehicle to get the rental documents. *Ibid*.

After McNichols reentered the car, Trooper Hughes ordered Wilson out of it. As Wilson followed the trooper's request to walk closer to the police vehicle, what appeared to be (and was) crack cocaine fell to the ground. Hughes then arrested Wilson. *Id*., at 2-3.

On January 10, 1995, the trial court granted defendant's suppression motion. The Maryland Court of Special Appeals

affirmed, finding that Trooper Hughes violated the Fourth Amendment when he asked Wilson, a passenger, to leave the car. *Id*., at 15.

SUMMARY OF ARGUMENT

A bright-line rule is appropriate for the frequently occurring situation demonstrated by the present case. Bright-line rules serve a useful purpose in the interpretation of the Fourth Amendment. Most importantly, such rules help clarify an immensely complex body of law. Since the primary focus of the Fourth Amendment is controlling the actions of law enforcement officers, a group with little formal legal training, efforts to keep Fourth Amendment law clear are consistently worthwhile. This need for simplicity is amplified by the method of enforcing the Fourth Amendment—the exclusionary rule. Since officers cannot be deterred by a body of law they cannot understand, bright-line rules can help make certain that the Fourth Amendment is observed.

Bright-line rules serve two other purposes: consistency and certainty. The inconsistent application of precedent is poisonous to Fourth Amendment law, given the high costs associated with the exclusionary rule. Bright-line rules can help avoid inconsistent application of otherwise muddy precedent. This consistency also makes the law more certain, thus allowing police to develop plans to comply with the Fourth Amendment. Such planning can greatly reduce the trade-off between effective law enforcement and the public's privacy.

Several times this Court has formulated such rules to help guide the police, public, and courts through the often confusing thickets of the Fourth Amendment. These cases demonstrate that this Court is willing to formulate such rules when there exists a common set of facts that can be governed by a clear rule, a need for rulemaking, and the rule complies with Fourth Amendment precedent.

Extending the bright-line rule of *Pennsylvania* v. *Mimms*, 434 U. S. 106 (1977) from drivers to passengers of stopped vehicles is consistent with this Court's Fourth Amendment bright-line jurisprudence. Since the present case involves a

simple extension of the rule in *Mimms*, the proposed rule readily satisfies the feasibility and need requirements. A bright-line rule is as relevant to encounters with passengers as it was to the officer-driver encounter in *Mimms*.

Extending *Mimms* to passengers is also consistent with precedent. The rule in *Mimms* was justified by balancing society's considerable interest in police safety against the minimal intrusion of ordering the driver to leave the car. The same balance holds in the present case. A passenger is at least as dangerous to officers as the driver of the stopped vehicle. The key for an officer to avoid assault or death is to control the encounter. The presence of a passenger at a vehicle stop divides the officer's attention and makes this control more difficult to maintain. In this situation, at least as dangerous as the one in *Mimms*, ordering the passenger out of the car is a reasonable tactic for maintaining control.

Ordering the passenger out of the vehicle is no more intrusive than the same order to the driver upheld in *Mimms*. Like the driver in *Mimms*, the passenger has already been inconvenienced by the stop. Contrary to the decision below, the passenger has little realistic chance of leaving. As in *Mimms*, the only question is whether the passenger shall be inconvenienced standing up or sitting down. There is thus no difference between the intrusiveness of the seizure in *Mimms* and the present case. Therefore, the rule of *Mimms* should be extended to passengers.

ARGUMENT

I. Bright-line rules serve a necessary and useful function in interpreting the Fourth Amendment.

The Fourth Amendment presents a dilemma. It is an immensely important part of the Constitution. Every arrest, search, and seizure made by any government agent in this country must satisfy the Fourth Amendment. To some, this amendment occupies "a place second to none in the Bill of Rights . . . ." *Harris* v. *United States*, 331 U. S. 145, 157 (1947) (Frankfurter, J., dissenting).

The Fourth Amendment's dilemma is that its importance is equalled by the difficulty of interpreting its vague text. See, *e.g.*, 1 W. LaFave, Search and Seizure § 1.1(a), pp. 5-6 (3d ed. 1996). This combination of vagueness and pervasiveness has led to a body of law unsurpassed in scope and complexity, with a five-volume, 3,300-page treatise devoted to its interpretation. See generally LaFave, *supra*.[2]

One way around this problem is the fashioning of bright-line rules to help guide the police and courts through the Fourth Amendment, an approach championed by the foremost advocate of the exclusionary rule. See LaFave, The Fourth Amendment in an Imperfect World: On Drawing 'Bright Lines' and 'Good Faith,' 43 U. Pitt. L. Rev. 307, 321 (1982). They make the Fourth Amendment more manageable by providing it with much-needed clarity, consistency, and certainty. It is therefore understandable that such rules have also found favor with the United States Supreme Court. This type of rule can and should be fashioned to govern the situation occurring in the present case.

A. Clarity.

Complexity is at best a necessary evil for a body of law. While some complexity is inherent in an endeavor as vast as regulating all searches and seizures, it should be minimized whenever possible. "Our constitutional law has become ever more complex in recent decades. That is, in itself, a regrettable development, for the law draws force from the clarity of its command and the certainty of its application." *Doggett* v. *United States*, 505 U. S. 647, 669 (1992) (Thomas, J., dissenting).

The need for simplifying the Fourth Amendment is particularly important because search and seizure law is primarily aimed at controlling the actions of police. See *United States* v. *Calandra*, 414 U. S. 338, 347 (1974). A body of law that is complex and confusing to lawyers, judges and scholars can be

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2. In comparison, it took Professor LaFave around 1,200 pages to explain all of the substantive criminal law. See W. LaFave & A. Scott, Substantive Criminal Law (1986).

particularly difficult to follow for officers with little, if any, formal legal training.

> "Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be literally impossible of application by the officer in the field." *New York* v. *Belton*, 453 U. S. 454, 458 (1981) (internal quotations omitted).

This is particularly relevant to the frequently hectic encounters classified as *Terry* stops. Such "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat," *Terry* v. *Ohio*, 392 U. S. 1, 20 (1968), prevents detailed, nuanced analysis by the officer before the decision to stop is made. *Cf. United States* v. *Cortez*, 449 U. S. 411, 418 (1981) (courts must weigh evidence supporting a stop "not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement"). In such fast-acting situations, the guidance and clarity of bright-line rules is a useful tool.

The need for clarity in the Fourth Amendment is heightened even further by the method used to enforce it. The sole reason for the exclusionary rule is to promote adherence to Fourth Amendment principles by deterring police misconduct through the suppression of illegally obtained evidence. See, *e.g.*, *United States* v. *Leon*, 468 U. S. 897, 906 (1984); *Calandra*, *supra*, 414 U. S., at 348. In order for the exclusionary rule to deter, however, police must be able to understand the commands of the Fourth Amendment. If the rule is to work, "it must alter the behavior of individual law enforcement officers or the policies of their departments." *Leon*, *supra*, 468 U. S., at 918. If an officer cannot understand what the law commands, deterrence is impossible. And if deterrence fails, then there is no reason to apply the exclusionary rule. *United States* v. *Janis*, 428 U. S. 433, 454 (1976). It is therefore imperative for the Fourth

Amendment to be as clear as possible so that the courts may enforce it.

B. Consistency.

Another advantage of drawing bright lines is promoting judicial consistency. A rule so vague as to give the judges interpreting it uncontrolled discretion is not a rule of law, but a rule of "equity [which] varies like the Chancellor's foot." *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 417 (1975) (internal quotation marks omitted; brackets in original).

Such inconsistency is particularly poisonous to Fourth Amendment law, given the high costs associated with the exclusionary rule. A seemingly arbitrary application of the exclusionary rule by lower courts can only add to the public's inevitable alienation from our justice system that occurs when "[t]he criminal is to go free because the constable has blundered . . . ." *People* v. *Defore*, 150 N. E. 585, 587 (N. Y. 1926) (Cardozo, J.); see *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 413 (1971) (Burger, C. J., dissenting); see also 8 J. Wigmore, Evidence §2184a, p. 31, n. 1 (McNaughten rev. 1961). Indeed, "if applied indiscriminately it [the exclusionary rule] may well have the opposite effect of generating disrespect for the law and administration of justice." *Stone* v. *Powell*, 428 U. S. 465, 491 (1976).

The threat of inconsistent application to the effective administration of the Fourth Amendment is real. In *California* v. *Acevedo*, 500 U. S. 565 (1991), inconsistent application by the lower courts was an important factor in this Court's decision to abandon the *Chadwick-Sanders* rule governing searches of closed containers. *Chadwick* and *Sanders* extended the warrant requirement to protect some closed containers like luggage. See *United States* v. *Chadwick*, 433 U. S. 1, 13 (1977); *Arkansas* v. *Sanders*, 442 U. S. 753, 763-765 (1979). Yet under a line of cases starting with *Carroll* v. *United States*, 267 U. S. 132 (1925), the high court recognized that the warrant requirement could be dispensed with for searches of moving vehicles because the inherent mobility of vehicles often made obtaining a search warrant impractical. See *id.*, at 153. The conflict between *Chadwick-Sanders* and *Carroll* with regard to containers found in automobiles caused considerable confusion in the lower

courts. See *Acevedo*, *supra*, 500 U. S., at 576. Recognizing "the virtue of providing ' " ' "clear and unequivocal" ' " ' guidelines," the *Acevedo* Court adopted a bright-line rule and abandoned the *Chadwick-Sanders* line. *Id.*, at 577, 579 (quoting *Minnick* v. *Mississippi*, 498 U. S. 146, 151 (1990) (quoting *Arizona* v. *Roberson*, 486 U. S. 675, 682 (1988))). The *Acevedo* Court, when confronted by such confusion, "conclude[d] that it is better to adopt one clear-cut rule to govern automobile searches . . . ." *Id.*, at 579.

The consistency provided by bright-line rules thus supplements the efficient administration of justice. When the rules are clear, the lower courts will have fewer matters to disagree about, freeing up resources that would otherwise be spent resolving such disputes. See Supreme Court Rule 10 (conflicts among lower courts as principal ground for grant of certiorari).

Such efficiency is particularly important when administering compliance with *Terry* v. *Ohio*, 392 U. S. 1 (1968), where the alternative to judicial rulemaking is a case-by-case determination of "the totality of the circumstances . . . ." See *United States* v. *Cortez*, 449 U. S. 411, 417 (1981). If each case is to be determined on its own individual facts, then the ability of higher courts to guide lower courts is greatly circumscribed, since each case has its own unique "totality of the circumstances." Under this condition, a higher court's decision has less authority over lower courts that must decide each case on its necessarily unique facts. Bright-line rules, by limiting subtle factual distinctions, allow this Court to magnify the impact of its decisions, better enabling it to oversee the administration of the Fourth Amendment.

C. Certainty.

A further benefit of clear, consistently applied laws is certainty. Once the law enforcement profession understands what the Fourth Amendment requires, and is confident that this understanding will not be undermined by subsequent decisions, it will be better able to plan how to comply with the Fourth Amendment while maximizing its fight against crime. This is a benefit that is significantly encouraged by the promulgation of bright-line rules.

While police investigative techniques were traditionally informal and rarely reduced to writing, the modern trend is to " 'record enforcement practices in written form, usually referring to the written statements as "guidelines." ' " LaFave, Constitutional Rules for Police: A Matter of Style, 41 Syracuse L. Rev. 849, 867 (1990) (quoting F. Remington, *et al.*, Criminal Justice Administration (rev. ed. 1982)). Professor LaFave recognizes

> "[T]his is a most encouraging development, to be sure, for departmental policymaking regarding those police activities which are subject to constitutional restraint 'improves police performance' in four major ways: (1) 'Rulemaking enhances the quality of police decisions,' as it focuses attention on the fact that policy is being made, promotes the placing of decision-making authority in responsible and capable hands, increases the seriousness with which police face up to the implications of their practices for the efficiency of law enforcement and the liberty of citizens, promotes decision-making efficiency, and enhances police prestige and morale; (2) 'Rulemaking tends to ensure the fair and equal treatment of citizens,' as rules reduce the influence of bias, provide uniform standards for use in the training of personnel, and serve both to guide and to control police behavior; (3) 'Rulemaking increases the visibility of police policy decisions,' as the rulemaking process requires the departmental command structure to learn what officers in the field are doing, and informs other governmental agencies and the public about what the police are doing; and (4) 'Rulemaking offers the best hope we have for getting policemen consistently to obey and enforce constitutional norms that guarantee the liberty of the citizen' as rules made by the police are most likely to be obeyed by the police and, when not obeyed, are most likely to be effectively enforced by the department." *Id.*, at 867-868 (quoting Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 423, 425, 426, 428 (1974) (footnotes omitted)).

By promoting a clear, consistently applied Fourth Amendment jurisprudence, bright-line rules help encourage this positive trend. The stability promoted by such precedents makes possible the planning needed to create departmental policies. People will

not plan when a body of law is so uncertain that it is unpredictable. A close parallel to this principle can be found in the doctrine of *stare decisis*. The most important role of *stare decisis* is preserving expectations. "*Stare decisis* provides some moorings so that men may trade and arrange their affairs with confidence. *Stare decisis* serves to take the capricious element out of law and to give stability to a society." Douglas, Stare Decisis, 49 Colum. L. Rev. 735, 736 (1949). The certainty and stability afforded by bright-line rules make police planning similarly easier, lessening the trade-off between following the Fourth Amendment and investigating crimes.

D. Precedent.

The best testimony for the validity of bright-line rules in Fourth Amendment law comes from this Court's precedents. In several decisions, this Court has demonstrated a willingness to draw such lines. These decisions demonstrate that clarity has a necessary place in Fourth Amendment jurisprudence.

1. United States v. Robinson.

One of the earliest examples of a bright-line Fourth Amendment rule is found in *United States* v. *Robinson*, 414 U. S. 218 (1973). In *Robinson*, the court below had held that an officer could not conduct a full search incident to an arrest for driving without a license, since such a search could not retrieve any evidence related to the crime for which the defendant was arrested. Instead, the circuit court held that under these particular facts, an officer could only conduct a frisk for weapons similar to the one in *Terry* v. *Ohio*, 392 U. S. 1 (1968). *Robinson*, 414 U. S., at 227.

The *Robinson* Court refused to make such a narrow, factual distinction. It rejected the notion that an officer's authority to search incident to an arrest was dependent upon such facts as the likelihood that the arrestee possessed evidence of the crime or the possibility that the suspect was armed. See *id.*, at 233-234. This Court chose to create a rule allowing a full search of the arrestee incident to *any* arrest.

> "A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." *Id.*, at 235.

The ability of the *Robinson* Court to fashion a bright-line rule was derived from three factors. First, *Robinson* dealt with a situation, a lawful arrest, that is both distinct and frequently repeated. This made it possible for the Court to formulate a bright-line rule governing an appropriately narrow, but important, situation. No single rule can govern a wide variety of distinct settings. See *Illinois* v. *Gates*, 462 U. S. 213, 231-232 (1983). Thus, broad concepts such as probable cause or reasonable suspicion, which deal with a near-infinite variety of situations, cannot be " 'reduced to a neat set of legal rules' " that will govern every circumstance. See *United States* v. *Sokolow*, 490 U. S. 1, 7 (1989) (quoting *Illinois* v. *Gates*, 462 U. S. 213, 232 (1983)). *Robinson* recognized that narrower factual settings are capable of being analyzed under a clear, distinct rule.

The second factor that allowed the *Robinson* Court to draw a bright line was the need to eliminate guesswork. It understood that custodial arrests involved real dangers to police officers, see *Robinson*, *supra*, 414 U. S., at 234-235, and therefore required necessarily quick judgments by the officers. *Id.*, at 235. In this situation, a quick, easily understood rule is both practical and necessary.

The final factor that allowed the *Robinson* Court to draw the line was the rule's compatibility with Fourth Amendment precedent. If a search or seizure is inappropriate in a particular situation, there is no reason to sanction the invasion simply because a bright line can be drawn. Since there were at least some authorities "to support the broad statement of the authority to search incident to arrest," *id.*, at 232-233, the *Robinson* Court

could create a rule sanctioning searches incident to all lawful arrests. As shall be shown, the three *Robinson* factors are common to this Court's bright-line cases.

2. Dunaway v. New York.

Bright lines do not have to be inclusive. This Court is also willing to create clear rules that exclude evidence. In *Dunaway* v. *New York*, 442 U. S. 200 (1979), the police picked up defendant and took him to the station house for questioning, even though there was not probable cause for an arrest. *Id.*, at 203. New York attempted to justify this detention by advocating "a multifactor balancing test of 'reasonable police conduct under the circumstances' to cover all seizures that do not amount to technical arrests." *Id.*, at 213. In rejecting this test, the *Dunaway* Court drew a bright line in order to increase Fourth Amendment protections.

> "But the protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the 'often competitive enterprise of ferreting out crime.' *Johnson* v. *United States*, 333 U. S. 10, 14 (1948). A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Id.*, at 213-214.

The same practical rationale that motivated the rulemaking in *Robinson* is found in the *Dunaway* decision. As in *Robinson*, the *Dunaway* Court refused to create a continuum of subtle factual variations, instead treating all detention for custodial interrogation as requiring probable cause. *Id.*, at 216. Once again, the Court found a category of common conduct that was capable of being governed by a single, clear rule.

The *Dunaway* Court also found a need for a bright-line rule. In the passage quoted above, the Court gave its reason for drawing the line—giving police officers, who frequently have little time to engage in the detailed analysis required by balancing tests, a "single, familiar standard" to guide them. *Id.*, at 213.

Finally, as in *Robinson*, the *Dunaway* Court found that its bright-line rule was consistent with Fourth Amendment precedent. See *id.*, at 214.

3. New York v. Belton.

The pattern that manifested itself in *Robinson* and *Dunaway* reappeared in *New York* v. *Belton*, 453 U. S. 454 (1981). As in *Robinson* and *Dunaway*, *Belton* dealt with a single, easily classified form of conduct: a search incident to the lawful, custodial arrest of an occupant of an automobile. *Id.*, at 455.

The *Belton* Court also found ample need for a bright-line rule for this category of searches. The principles governing searches incident to arrest first announced in *Chimel* v. *California*, 395 U. S. 752 (1969) "may be stated clearly enough, [but] courts have discovered the principle difficult to apply in specific cases." *Belton*, 453 U. S., at 458. The confusion in the law created a situation where a person "cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." *Id.*, at 460. Therefore, it was necessary to craft " '[a] single familiar standard . . . to guide police officers' " whose time and Fourth Amendment expertise were limited. *Id.*, at 458 (quoting *Dunaway*, *supra*, 442 U. S., at 213-214) (brackets added by *Belton* Court).

Following the pattern established in *Robinson* and *Dunaway*, the *Belton* Court also made sure that the rule it formulated was consistent with precedent. Thus, the *Belton* Court relied on *Chimel* to justify announcing a bright-line rule that an officer making a custodial arrest of the occupant of a car may search the passenger compartment contemporaneous to the arrest. 453 U. S., at 460. Although it followed *Chimel*, the need to formulate a clear, "workable rule" guided the *Belton* Court's interpretation of precedent. *Ibid.* While the need for a bright line cannot dictate a particular result, it can guide a court's interpretation of Fourth Amendment precedents. *Belton* demonstrates that when a common set of facts is capable of being governed by a clear, readily administrated rule, the high court will make a reasonable effort to draw a bright line.

4. Michigan v. Summers.

Michigan v. *Summers*, 452 U. S. 692 (1981) provides another excellent demonstration of this Court's willingness to create bright-line rules to clarify the Fourth Amendment. As in the present case, *Summers* dealt with the police's power over an individual in a private residence that was being searched under a valid warrant. See *id.*, at 693-694.

Instead of adopting a case-by-case analysis under the reasonable suspicion standard of *Terry* v. *Ohio*, 392 U. S. 1 (1968), the *Summers* Court allowed police to detain any occupant of the premises who was encountered during the execution of a search warrant for drugs. See 452 U. S., at 705. Central to this decision were the same factors that compelled the Court to reach similar conclusions in *Robinson*, *Dunaway*, and *Belton*. The execution of a search warrant for contraband on a residence is a single, readily defined event that is nonetheless capable of subtle factual variation. For example, a person calmly leaving the property, such as Summers, see *id.*, at 701, could be deemed to be much less deserving of a *Terry* stop than someone fleeing the property upon sighting the police. See *California* v. *Hodari D.*, 499 U. S. 621, 623, n. 1 (1991); Hobson, Flight and *Terry*: Providing the Necessary Bright Line, 3 Maryland J. Contemp. Legal Issues 119 (1992).

As the *Summers* Court realized, it was impractical to require police executing a warrant to make such distinctions. Executing a search warrant for contraband involves a real "risk of harm to both the police and the occupants . . . ." 452 U. S., at 702-703. In such situations, extensive analysis is not always possible. Instead, officers must be allowed to make necessarily quick decisions. See *United States* v. *Robinson*, 414 U. S. 218, 235 (1973). Furthermore, when officers have substantial noninvestigative interests in conducting a search or seizure, the exclusionary rule will have little power to deter police conduct. See *Terry*, *supra*, 392 U. S., at 13-14. In recognition of these strong practical interests, the *Summers* Court fashioned its bright-line rule as an explicit rejection of a case-by-case approach to *Terry*. See 452 U. S., at 705, n. 19.

Finally, like the other bright-line cases, the rule in *Summers* was consistent with Supreme Court precedent. The warrant

provided the articulable individualized suspicion that satisfied *Terry*. See *id.*, at 703-704.

5. Pennsylvania v. Mimms.

The bright line closest to the present case is found in *Pennsylvania* v. *Mimms*, 434 U. S. 106 (1977) (*per curiam*). In *Mimms*, Philadelphia police officers stopped defendant for driving with an expired license plate. They asked Mimms to step out of his car and produce his driver's license and vehicle registration. As defendant left the car, officers noticed a large bulge under his sports jacket. A frisk of Mimms confirmed that he was carrying a handgun. The other occupant was also carrying a pistol. Defendant was convicted of carrying a concealed, deadly weapon and for carrying a firearm without a license. *Id.*, at 107.

The Pennsylvania Supreme Court struck down Mimms' conviction, holding that the officer's directive to defendant to leave the car was unreasonable because there were no " 'objective observable facts to support a suspicion that criminal activity was afoot or that the occupants of the vehicle posed a threat to police safety.' " *Id.*, at 108 (quoting *Commonwealth* v. *Mimms*, 370 A. 2d 1157, 1160 (Pa. 1977)).

This Court reversed Pennsylvania's high court. It did not choose to evaluate orders for drivers to leave stopped cars on a case-by-case basis. The state conceded that the officer "had no reason to suspect foul play from the particular driver at the time of the stop . . . ." *Id.*, at 109. Any justification for the order to leave the car must come from a higher level of generality than the facts of the case. Thus, when the *Mimms* Court chose to balance the interests of law enforcement and individual privacy, see *id.*, at 108-109, it was not balancing the interests of Mimms with the officers who stopped him. The *Mimms* Court chose to balance the general interests of all stopping officers and of all stopped drivers.

That balance required drawing a bright line in favor of officer safety. The Court had long "recognized the *inordinate* risks confronting an officer as he approaches a person seated in an automobile." *Id.*, at 110 (emphasis added). Enough violent incidents occurred at traffic stops to convince the Court to make

an officer's authority to order the driver out of the car independent from the reason for stopping the driver. See *ibid.* The risk of accidental harm from "passing traffic to an officer standing on the driver's side of the vehicle" further tipped the scales towards officer safety. *Id.*, at 111. Given the incidental intrusion from asking an already stopped driver to leave the car, see *ibid.*, the balance of interests supported allowing officers to order any driver out of a legally stopped automobile. See *ibid.*

While not as extensively analyzed as other cases, the *Mimms per curiam* opinion still contains the same characteristics as this Court's other bright-line cases. The officer's encounter with the driver of a stopped automobile is both distinct and frequently repeated. As in the other cases, this common set of facts was capable of subtle factual variation. One variable was the justification for stopping the car. Thus some argued that the danger to an officer may be a function of the seriousness of the offense for which the driver is stopped. See *id.*, at 119 (Stevens, J., dissenting). As Justice Stevens noted, this was but one of "the infinite variety of situations in which today's holding may be applied." *Id.*, at 120.

The *Mimms* Court also recognized the need for a bright-line rule. The vehicle stop created a "legitimate and weighty" risk to an officer's safety. The "inordinate risk confronting an officer as he approaches a person seated in an automobile," *id.*, at 110, simply does not lend itself to any detailed analysis by the officer in the field. A hard and fast rule was needed in order to prevent officers from being placed in dangerously ambiguous situations.

The line drawn by the *Mimms* Court was not perfectly bright. The decision stated that

> "we do not hold today that 'whenever an officer has an occasion to speak with the driver of a vehicle, he may also order the driver out of the car.' We hold only that once a motor vehicle has been lawfully detailed for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures." *Id.*, at 111, n. 6 (quoting Stevens, J., dissenting, at 122).

Some defendants have invoked this passage to assert that officers do not have the authority to order the driver out of a vehicle stopped under the reasonable suspicion standard of *Terry* v. *Ohio*, 392 U. S. 1 (1968). See 4 W. LaFave, Search and Seizure § 9.5, p. 266 (3d ed. 1996). This contention is absurd, and this Court should take the opportunity in the present case to clarify the rule of *Mimms* to include *Terry* stops.

Finally, *Mimms*' bright line was consistent with precedent. The *Mimms* Court relied on the analytical bedrock of the Fourth Amendment—"the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Terry*, 392 U. S., at 19; see *Mimms*, 434 U. S., at 109. "Reasonableness, of course, depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.' " 434 U. S., at 109 (quoting *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878 (1975)). Justifying its bright-line rule under this balancing test, see *id.*, at 110-111, brought the *Mimms* rule comfortably within this Court's Fourth Amendment jurisprudence. This same process can justify a bright-line rule in the present, nearly identical case.

II. The bright-line rule of *Mimms* should be extended to passengers of legally stopped vehicles.

A. Ability and Need.

The proposed rule in the present case is no more than a simple extension of the already existing bright-line rule of *Pennsylvania* v. *Mimms*, 434 U. S. 106 (1977) (*per curiam*) from drivers to passengers. Therefore, the discussion of this situation's susceptibility to and need for a bright-line rule is brief.

This Court is certainly able to draw a bright line in the present case. There is nothing about the passenger in the car that frustrates this Court's competence to make a clear rule. Extending *Mimms* to passengers will neither frustrate its clarity nor defeat its purpose.

The only difference between *Mimms* and the present case is that this Court should make clear that the rule extends to the occupants of vehicles validly stopped under *Terry* v. *Ohio*, 392

U. S. 1 (1968). A vehicle stopped under *Terry*'s reasonable suspicion of criminality poses at least as much danger to the officer as the traffic offender in *Mimms* or the present case. See 4 W. LaFave, Search and Seizure § 9.5, pp. 266-267 (3d ed. 1996); *United States* v. *White*, 648 F. 2d 29, 37-38 (D. C. Cir. 1981). This Court should make explicit in the present case the implicit scope of the rule in *Mimms*.

The need for a bright-line rule is at least as great in the present case as it is in *Mimms*. The danger to officers posed by passengers will be discussed in greater detail later. See *infra*, at 20-22. It is worth noting, however, that the vehicular stop creates a quickly developing encounter where detailed legal analysis is not practical. The presence of passengers neither slows down nor simplifies the encounter.

> "In threatening situations in which a violator, and possible occupants of the vehicle, confronts a police officer on the highway, the major threat to the officer is the fast-breaking characteristics of the situation. No one, in book or classroom, can adequately describe what will happen nor how fast it does happen. It is for this reason that the words 'taking command' are so very appropriate, as this phrase implies equally rapid action by the officer to halt and *hold* the fast-breaking threat to his/her personal safety." P. Weston, The Police Traffic Control Function 158 (4th ed. 1978) (emphasis in original).

The danger of traffic stops, see *Mimms*, *supra*, 434 U. S., at 110, is shown in the statistics. In the years 1984-1993, over 13% of all law enforcement officer fatalities occurred at traffic stops or pursuits. See U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics—1994, p. 358 (1995). This number exceeds the fatalities arising from most law enforcement activities. Family quarrels, burglaries, or robberies all cause fewer officer fatalities. See *ibid*. Even drug-related activities, whose dangers to officers have influenced this Court, see *Michigan* v. *Summers*, 452 U. S. 692, 702 (1981), kill fewer officers than traffic stops. See Sourcebook, at 358. Although the sheer volume of traffic stops accounts for these numbers, the fact is that many officers do die at traffic stops.

The need for a bright-line rule is thus at least as great in the present case as it was in *Mimms*. This need defeats the arguments of those who would extend *Mimms* to passengers only when the stop is for "suspicion of more serious criminal activity involving use of that vehicle . . . ." 4 LaFave, *supra*, § 9.5, at 269. This standard does not, and cannot, define what offenses are serious enough. It also ignores the real danger posed by traffic stops. See *Mimms*, *supra*, 434 U. S., at 110; *United States* v. *Robinson*, 414 U. S. 218, 234, n. 5 (1973). Finally, this proposal establishes two rules under *Mimms*, one for drivers and another for passengers, which can only serve to muddy *Mimms*' bright line. If *Mimms* is to extend to passengers, it must do so entirely.

B. Precedent.

Drawing a bright line in the present case is entirely consistent with this Court's precedents. Once again, *Pennsylvania* v. *Mimms*, 434 U. S. 106 (1977) (*per curiam*) is the focal point of the bright-line analysis. The differences between *Mimms* and the present case are minimal. The small extension of *Mimms* from drivers to passengers of stopped vehicles is thus consistent with precedent.

The *Mimms* Court arrived at its decision by balancing the interests of society against the intrusion on personal liberty of ordering stopped drivers out of their vehicles. See *id*., at 109. The *per curiam* opinion found the balance overwhelmingly in favor of the state. There is an extremely strong state interest in allowing police to order stopped drivers out of their vehicles. It was simply "too plain for argument that the State's proffered justification—the safety of the officer—is both legitimate and weighty." *Id*., at 110. Every vehicle stop was a potential threat to this important interest. "And we have specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile." *Ibid*.

Against this interest, the *Mimms* Court weighed the intrusion of the order to exit the car. This additional intrusion was "de minimus." The driver has already been lawfully detained; asking him to leave the car is no more than a " 'petty indignity.' " See *id*., at 111 (quoting *Terry* v. *Ohio*, 392 U. S. 1, 17 (1968)). Comparing the substantial benefits to these minimal

costs decisively favored the state. "What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety." *Ibid.*

There is no difference between *Mimms* and the present case in the state's interests. The single most important determinant of officer safety is the officer's ability to control a given situation.

> "Improper control of situations or suspects is of particular importance to law enforcement officers since the officer represents a symbol of societal or normative control to any offender. The degree of control over the situation that is maintained by the law enforcement officer will affect the behavior of all parties in the encounter. The aspects of the physical, social, and psychological control of these incidents often dictate their eventual outcome." U. S. Dept. of Justice, Federal Bureau of Investigation, Killed in the Line of Duty 40 (1992).

As this Court noted in the context of executing search warrants, danger is minimized "if the officers *routinely* exercise unquestioned command of the situation." *Michigan* v. *Summers*, 452 U. S. 692, 703 (1981) (emphasis added).

Control is equally important to the safe execution of a traffic stop. The vehicle stop is a great source of assaults and homicides against police. See *Mimms*, *supra*, 434 U. S., at 110. Danger can be limited only if officers are allowed to control each stop in its entirety.

> "No vehicle check is routine: each places the officer in a potentially life-threatening situation. And, as the statistics show, an initial impression that you are in no danger is no guarantee of security. There is always an element of danger and no vehicle check should ever be undertaken in a relaxed or complacent manner." D. Rowland & J. Bailey, The Law Enforcement Handbook 76 (1985); see *Mimms*, 434 U. S., at 110.

The presence of a passenger only adds to the danger of an automobile stop. Each extra person is an additional variable for the officer to control. The presence of extra people inevitably divides the officer's attention. The greatest threat to any officer is an unsupervised, and thus uncontrolled, person. It is this

person who can assault or shoot an officer without giving the officer a chance to respond. At a traffic stop, an officer will naturally pay most attention to the offender, the driver. Therefore, the passenger may be more dangerous to the officer than the driver who was stopped.

An example of the danger posed by passengers is cited by the Federal Bureau of Investigation in its study of officer deaths.

> "In another example, the victim officer executed a traffic stop in which there were three individuals in the vehicle. The victim wanted to cite the driver for a traffic violation, disregarding the two passengers. One of the passengers exited the vehicle, approached the patrol car in which the officer was seated, and shot and killed the officer.
>
> "In some of these cases, it appears that the officer was a victim of 'tunnel vision,' that is, the focus of his or her approach was on one person, and the other people in the group were neglected or ignored, resulting in the officer's demise." Killed in the Line of Duty, *supra*, at 37.

The potential danger posed by passengers is also found in several cases that approved extending *Mimms* to passengers where officers found handguns on the passenger or hidden in the vehicle. See *People* v. *Robinson*, 543 N. E. 2d 733, 733 (N. Y. 1989) (*per curiam*) (loaded .357 magnum protruding from under passenger's seat); *State* v. *Ferrise*, 269 N. W. 2d 888, 889 (Minn. 1978) ("long-barreled gun" found between car door and passenger seat); *People* v. *Martinez*, 466 N. W. 2d 380, 382 (Mich. App. 1991) (unloaded nine-millimeter Walther PPK-S semiautomatic pistol under passenger side floorboard). The danger posed by passengers is reinforced by the FBI's study of officer fatalities. Fourteen of the officer fatalities studied by the FBI involved an encounter between an officer and more than one person. "Eleven of these killers were not the target of the officer's initial approach." Killed in the Line of Duty, *supra*, at 37. If an officer is not allowed to exert some control over the passenger, that officer runs the risk of not paying attention to those passengers with access to loaded handguns, with potentially fatal results.

Ordering a passenger outside the vehicle allows the officer to better control this potential danger. A passenger outside the

car is less able to hide movements, and is deprived of access to any weapons hidden in the vehicle. It is thus a recommended tactic for officers who sense danger from a traffic stop. See D. Rowland & J. Bailey, The Law Enforcement Handbook, *supra*, at 86-87. While all may not agree on the efficiency of this method, see *Mimms*, *supra*, 434 U. S., at 119 (Stevens, J., dissenting), it is certainly a reasonable tactic. See *id.*, at 110. The Fourth Amendment does not require this Court to choose between reasonable law enforcement methods. *Michigan Dept. of State Police* v. *Sitz*, 496 U. S. 444, 453-454 (1990).

The interest in allowing an officer to order a passenger out of a stopped vehicle is as great or greater than the interest that supported the result in *Mimms*. Unless ordering the passenger to leave is substantially more intrusive than the order to the driver upheld in *Mimms*, this Court should extend *Mimms* to passengers.

The intrusiveness of the order in the present case must be analyzed in the context of *Mimms*' view of intrusiveness. The *Mimms* Court found ordering the driver of a stopped car to exit to be minimally intrusive. It rested this conclusion on two factors: "[1] The driver is being asked to expose to view very little more of his person than is already being exposed. [2] The police have already lawfully decided that the driver shall be briefly detained; the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it." *Mimms*, 434 U. S., at 111.

There is no difference between *Mimms* and the present case for the first factor. A passenger is as exposed as the driver before exiting the vehicle and similarly exposed upon leaving. Each intrusion is equally trivial.

The only possible difference lies in the second factor, the fact that there has already been a valid stop. Some have seized upon this distinction as a reason to prevent *Mimms* from extending to passengers. It is contended that while it may be permissible to intrude upon a driver who has already been identified as a traffic violator, it is simply too much to make the same imposition upon innocent passengers. See 4 W. LaFave, Search and Seizure § 9.5(a), pp. 267-268 (3d ed. 1996).

This analysis is too discriminating when it comes to the costs of being stopped. As this Court has noted, the harm of a traffic stop is virtually indistinguishable between driver and occupant.

> "We cannot assume that the physical and psychological intrusion visited upon the *occupants* of a vehicle by a random stop to check documents is of any less moment than that occasioned by a stop by border agents on roving patrol. Both of these stops generally entail law enforcement officers signaling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority. Both interfere with freedom of movement, are inconvenient, and consume time. Both may create substantial anxiety." *Delaware* v. *Prouse*, 440 U. S. 648, 657 (1979) (emphasis added).

The authority to order the driver out of the vehicle is not a part of the suspicion supporting the stop. The *Mimms* Court rejected the Pennsylvania Supreme Court's conclusion that some " 'objective observable facts to support a suspicion that criminal activity was afoot or that the occupants of the vehicle posed a threat to police safety' " was necessary before an officer could order the driver out of the vehicle. See 434 U. S., at 108 (quoting *Commonwealth* v. *Mimms*, 370 A. 2d 1157, 1160 (Pa. 1977)). Any justification for differentiating the intrusiveness of the stops in *Mimms* and the present case must rest on a distinction other than the initial suspicion behind the stop.

New York v. *Class*, 475 U. S. 106 (1986) does not tip the balance to the passenger. In *Class*, defendant got out of his vehicle and approached one officer after a traffic stop. *Id.*, at 108. The other officer opened the car door and reached in to move some papers obscuring the Vehicle Identification Number (VIN). In doing so, the officer observed a gun handle protruding from the driver's seat, leading to the gun's seizure and defendant's arrest. *Ibid.*

Part of *Class*' justification for upholding this search was that cases' similarity to the situation in *Mimms*.

> "When the officer's safety is less directly served by the detention, something more than objectively justifiable suspicion is necessary to justify the intrusion if the balance is to tip in favor of the legality of the governmental intru-

sion. In *Pennsylvania* v. *Mimms*, *supra*, at 107, the officers had personally observed the seized individual in the commission of a traffic offense before requesting that he exit his vehicle. . . . All three of the factors involved in *Mimms* and *Summers* are present in this case: the safety of the officers was served by the governmental intrusion; the intrusion was minimal; and the search stemmed from some probable cause focusing suspicion on the individual affected by the search. Indeed, here the officer's probable cause stemmed from directly observing respondent commit a violation of the law." *Id.*, at 117-118.

The decision below incorrectly invoked this passage to limit *Mimms* to drivers. See *State* v. *Wilson*, 664 A. 2d 1, 11 (Md. App. 1995). It is true that the probable cause supporting the traffic stop played some role in *Mimms*. Yet this factor played the tiniest of roles. In the section of the opinion dealing with the decision to keep *Class* from entering his car, the Court enunciated the driving force behind *Mimms*.

> "*While we impute to respondent no propensity for violence*, and while we are conscious of the fact that respondent here voluntarily left the vehicle, the facts of this case may be used to illustrate one of the principal justifications for the discretion given police officers by *Pennsylvania* v. *Mimms*: while in the driver's seat, respondent had a loaded pistol at hand. *Mimms* allows an officer to guard against that possibility by requiring the driver to exit the car briefly." *Class*, *supra*, 475 U. S., at 116 (emphasis added).

Thus, *Mimms* does not tie the officer's authority to order the driver out of the car to any suspicion arising from the traffic offense. It is "a concern for the safety of the police" that allows officers to "exercise their discretion to require a driver who commits a traffic violation to exit the vehicle even though *they lack any particularized reason for believing the driver possesses a weapon*. *Pennsylvania* v. *Mimms*." *Ibid.* (citation omitted; emphasis added).

Although the balance may tip more towards the passenger who has not committed any offense, it is by the lightest measure. Safety weighs at least as heavily for the officers in the present case as it did in *Mimms*. Given the overwhelming importance of

this interest and triviality of the intrusion, the absence of a common traffic violation does not tip the balance to the passenger. *Class* does not prevent the safety net of *Mimms* from covering passengers.

The court below in the present case noted that a passenger can freely leave the car while the stopped driver is not permitted this same freedom until the stop is concluded. *Wilson*, *supra*, 664 A. 2d, at 10. The order to exit the car "is the imposition of detention *per se*, and not a mere shift of the location of already established detention." *Ibid.*

This misunderstands the realities of the traffic stop. People are passengers in cars in order to get from one place to another with a minimum of expense, inconvenience, and time. The traffic stop frustrates these interests. A passenger who does not leave the driver behind will lose as much time and be as inconvenienced as the driver.

While the court below found that "[t]he passenger is presumptively free to abandon the driver to the clutches of the law and hail a cab," *ibid.*, this alternative does not realistically distinguish the fact that the passenger suffers similarly from the traffic stop. Unless the passenger can hail the cab from the car, that person will have to leave the vehicle to get the separate transportation, placing the passenger in the same situation as if ordered out by the officer. Hailing a cab will only lessen the loss of time and convenience caused by the initial stop; it will not eliminate these costs. Furthermore, taking a cab requires the passenger to assume additional expense in order to mitigate the consequences of a stop.

The lower court's abandonment hypothetical also ignores the reality of the driver-passenger relationship. Outside of commercial vehicles such as taxis, there is usually some personal relationship between the driver and the passenger. Only the most unusual relationships or situations will allow the passenger to abandon the driver to face the forces of the law alone. The reality of the vehicular stop is that it is generally as confining to the passenger as it is to the driver.

The only other possible difference in the effect of the stop between the driver and passenger is the fact that the stop publicly identifies the driver as having violated traffic laws. Ordering the

passenger out of the car may thus unfairly identify the passenger as one who has broken the law. This difference is no more than minimal. The real intrusion created by the vehicle stop is the inconvenience and delay created by the stop. The *Mimms* Court understood this when it summed up the intrusion suffered by the driver in that case. "The police have already lawfully decided that the driver shall be briefly detained; *the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it.*" 434 U. S., at 111 (emphasis added). For all practical purposes, the passenger is in the same situation. Defendant Wilson was going to be detained as long as his driver. The only question was in what position he would spend that time.

Wilson was potentially as or more dangerous to Trooper Hughes as his driver. Trooper Hughes' instruction to leave the car was no more intrusive to Wilson than it was to the driver. "Because the balance of convenience and danger is no different for passengers in stopped cars, the Court's logic necessarily encompasses the passenger." *Mimms*, 434 U. S., at 122 (Stevens, J., dissenting). It is time to take *Mimms* to its logical conclusion by extending its bright line to passengers.

CONCLUSION

The decision of the Maryland Court of Special Appeals should be reversed.

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Respectfully submitted,

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